139-462

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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1890.

No. 1239.

JIM LEEPER AND ED. POWELL, PLAINTIFFS IN ERROR,

vs.

THE STATE OF TEXAS.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF TEXAS.

FILED AUGUST 18, 1890.

during all that time the manner in which the powers of that government have been exercised has been watched with jealousy and subjected to the most rigid criticisms in all its branches, this special limitation upon its powers has rarely been invoked in the judicial forum or the more enlarged theater of public discussion. But while it has been a part of the Constitution as a restraint upon the powers of the States only a very few years, the docket of this court is crowded with cases in which we are asked to hold that State courts and State Legislatures have deprived their own citizens of life, liberty, or property without due process of law. There is here abundant evidence that there exists some strange misconception of the scope of this provision as found in the fourteenth amendment. In fact, it would seem from the character of many of the cases before us and the arguments made in them that the clause under consideration is looked upon as a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a State court of the justice of the decision against him and of the merits of the legislation on which such a decision may be founded."

The appellant having raised no Federal question in his application for the writ, nor stated therein any fact which can give the Federal courts jurisdiction of the case, we respectfully ask that the judgment of the Circuit Court below refusing the writ and dismissing the case for want of jurisdiction be in all things affirmed.

Respectfully submitted,

JAMES S. HOGG,
Attorney-General of Texas.

RICHARD H. HARRISON, Assistant,
Counsel for Appellee McCall.

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1 [Seal Court of Appeals of Texas.]

THE STATE OF TEXAS, }
County of Coryell. }

At a term of the district court, begun and holden within and for the county of Coryell, at Gatesville, on the 20th day of January, A. D. 1890, and which adjourned on the 15th day of February, A. D. 1890, the Hon. C. K. Bell, judge thereof, presiding, the following cause came on for trial, to wit:

THE STATE OF TEXAS }
vs. } No. 1451.
JIM LEEPER & ED. POWELL. }

JAN'Y 21ST, 1890.

On this day came into open court the grand jury, headed by their foreman, W. L. Saunders, and, a full and legal quorum being present, returned into open court the following bill of indictment, to wit:

Indictment. Filed Jan'y 21, 1890. *M. R. Hood, Cl'k D. C., Coryell Co., Tex.*

THE STATE OF TEXAS }
vs. } No. 1451. Murder.
JIM LEEPER and ED. POWELL. }

In the name and by the authority of the State of Texas, the grand jurors for the county of Coryell, State aforesaid, duly organized as such at the January term, A. D. 1890, of the district court for said county, upon their oaths in said court present that Jim Leeper and Ed. Powell, on or about the 17th day of December, A. D. one
2 thousand eight hundred and eighty-nine, in the county of Coryell and State of Texas, did then and there, with malice aforethought, kill and murder J. T. Mathis by then and there shooting him, the said J. T. Mathis, with a pistol, contrary to law and against the peace and dignity of the State.

W. L. SAUNDERS,
Foreman of the Grand Jury.

Arraignment and Plea of Defendants.

THE STATE OF TEXAS }
vs. } No. 1451.
JIM LEEPER & ED. POWELL. }

FEBRUARY THE 6TH, 1890.

This day Jim Leeper and Ed. Powell, the defendants, and their counsel being present in open court and the district attorney being present in court, and it appearing to the court that said defendants

had been duly served with a copy of the indictment herein at least two entire days prior to the present day, the court proceeded to cause the said defendants, Jim Leeper and Ed. Powell, to be arraigned herein in due form of law, to wit: The names of the said defendants, as stated in the indictment herein, were distinctly called; and thereupon the indictment herein was read to the said defendants, and each was asked whether he was guilty or not, as therein charged, and the said defendants each answered in person that he was not guilty; and his said plea of not guilty, as charged in said in-
3 dictment, is here now entered of record upon the minutes of this court.

Judgment and Verdict.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

FEBRUARY 6TH, A. D. 1890.

This day this cause was called for trial and the State appeared by her district attorney and the defendants, Jim Leeper and Ed. Powell, appeared in person, their counsel also being present, and the State announced ready for trial, and the defendants' application for a continuance was overruled and each of said defendants separately for himself, in open court, pleaded not guilty — the charge contained in the indictment herein. Thereupon a jury, to wit, M. A. Crawford and eleven others, was duly selected, impanneled, and sworn, who, having heard the indictment read and each of the defendants' plea of not guilty thereto, and having heard the evidence submitted and having been duly charged by the court, retired in charge of the proper officer to consider of their verdict, and afterwards were brought into open court by the proper officer, each of the said defendants and their counsel being present, and being asked if they had agreed upon a verdict answered they had, and returned to the court a verdict, which was read aloud by the clerk; and there-
4 upon the defendants ask that the jury be polled, and the name of each juror, as his name was called, was asked if the said verdict was his verdict, and each of said jurors announced in the affirmative. Whereupon the said verdict was received by the court and is here now entered upon the minutes of the court as follows:

We, the jury, find the defendant, Jim Leeper, guilty of murder in the first degree and assess his punishment at death.

M. A. CRAWFORD, *Foreman.*

We, the jury, find the defendant, Ed. Powell, guilty of murder in the first degree and assess his punishment at death.

M. A. CRAWFORD, *Foreman.*

It is therefore considered and adjudged by the court that the defendant, Jim Leeper, is guilty of the offense of murder in the first degree, as found by the jury, and that he be punished as has been

determined by the jury--that is, with death—and that he be remanded to jail to await the further order of this court herein.

It is therefore further considered and adjudged by the court that the defendant, Ed. Powell, is guilty of the offense of murder in the first degree, as found by the jury, and that he be punished as has been determined by the jury—that is, with death—and that he be remanded to jail to await the further order of this court herein.

5 *Statement of Facts. Filed Feb'y* 15, 1890.

In District Court, Coryell County, Tex. January Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL.

Be it remembered that on the trial of the above-entitled cause the following facts were proven and none others:

ALEX. LARGENT, witness for the State, testified:

I live now and during last December and for many years prior to that time I lived on Cow creek, in Coryell county, Texas. I knew J. T. Mathis during his lifetime. I saw him, after he was wounded, before he died; did not see him after he died. I do not know, of my own knowledge, that he is dead. At the time the shooting is said to have occurred I was at Mr. Jackson's, a mile and a half or two miles from the place where the shooting is said to have occurred; did not hear the shot, but was informed of it about eight o'clock on that night. I went to the place where Mathis was shot that night, but could not then make any discoveries; went there next morning. The place to which I went was on the Gatesville and Lampasas road, near the ten-mile post, near and about fifteen steps west of a branch called Riley branch, on the road. I saw a bloody place on the side of the road. There was a wide place in the lane at this
6 place; perhaps the fences were fifty yards apart; there was also a V-shaped place in the fence there. Between 28 or 33 steps further west on the road I saw where mules had jumped out of the road and jumped around and run; the mules had been hitched to a wagon. I examined the grounds and track carefully. I could see the tracks of a man who had evidently had hold of the mules. I saw where he had jumped or been pulled round and then where the mules had run off up parallel with the road for a short distance and then back into the road; the man's track did not follow the mules' tracks after they left the place where the struggle took place. I measured the man's tracks. I saw a track made by a man where he had crossed the branch going east; he had jumped at a rock and missed it; he then took a step upon the bank. This track showed plain, though the man who made it had slipped. I could not tell the length of the foot that made this track, but could the width; it was the same width, as I found by measuring, as the track made where the man had struggled with the mules. About

sixty yards east of the branch I found where two horses had been hitched either to a bush or to the posts of a wire fence; they had tramped around considerably, but the ground was hard and I could not get a good impression of the tracks made by them. About twenty steps further east than where
7 the horses had been hitched there was a swag or marshy place, and in that place I saw the imprint of a horse's feet which was perfectly plain. I measured two of these tracks accurately. I cannot now recall whether the tracks I measured were the two front feet or one front foot and one rear foot; but I am sure that one of them was a front foot. The tracks I measured were made by a shod horse and were unusually round. I measured the track in four different directions—that is, from heel to toe, across, and then from the cork to the opposite side; the distance was the same in each direction. The tracks of which I have spoken were all fresh. During the evening, on the same day, I was in Gatesville and saw Mr. Lanham, the sheriff, bring in the defendant Powell. Powell was riding a sorrel horse with a blaze in his face. I applied the measure that I had used where the killing of Mathis is said to have occurred to the feet of this horse and it exactly fit, being applied each way as I had used it in measuring on the ground. My impression is that each of the horses was shod, but of this I am not sure. I could not get a track of the other horse sufficiently plain to enable me to measure it. I saw a cartridge hull picked up the next morning after Mathis was shot near where
8 he was shot; it was a forty-five; this is a very common size cartridge, as there are more forty-five size than other sizes of pistols in use.

Dr. J. C. BAIRD, witness for the State, testified:

I am a practicing physician; live in Coryell county, near Pidcock, on the Lampasas and Gatesville road, twelve miles west of Gatesville. I knew J. T. Mathis; he is dead; died from the effect of a gunshot wound received on the night of December 17th, 1889. He lived about thirty-six hours after he was wounded and died on the morning of the 19th of December. The wound was made by a ball which entered on the left side, ranged a little upward, passed through one kidney and the liver and out through the right side, ranging upward and forward. Mathis gave me and others who were present an account of the circumstances under which he received the wound which resulted in his death. At the time he made such statement he was conscious of approaching death and believed that there was no hope of recovering; such statement was voluntarily made and not through the persuasion of any one; it was not made in answer to questions of any kind asked by any one, and he was, when he made the statement, sane. He told us as follows: "I was coming home from Gatesville. Just after dark and just after I had passed the ten-mile post and crossed the Riley branch
9 some one grabbed my mules, which were hitched to the wagon in which I was riding. The mules shied to the right and jumped from the road. Just at this time a man stepped up to

the left side of the wagon and presented a pistol at me and said, 'Give up your money.' I pulled on the reins, but the mules just about this time made a lunge and broke loose from the man who had been holding them. The man at the side of the wagon shot at me. The ball just passed back of my neck. My little boy was sitting by me on the wagon seat and I pushed him off of the seat and down into the wagon bed. Just as I did so I come up about even with the man who had had hold of the mules and he stepped forward, put his pistol close to me, and shot me through. The other man fired another shot at me, but missed me. I fell forward in the wagon. My mules continued to run and soon overtook the wagons of the other members of our party, by whom I was assisted home. I noticed the two men just before my mules were stopped, but supposed it was some of our crowd and thought nothing about them until the mules were stopped. I did not know either of the men, but I could see that one of them was considerably taller than the other. The short man was the one who grabbed the mules
10 and was also the man who shot me." This—that is, the wounding and the death of J. T. Mathis—all occurred in the county of Coryell and State of Texas and at the time I have stated.

W. K. BATES, witness for the State, testified:

I knew J. T. Mathis. On the day on which he was shot I took thirty bales of cotton to Gatesville and sold them. There were quite a number of us together. After I had sold the cotton I went into Holmes' saloon and bought a jug of whisky. I took out of my pocket a roll of bills, perhaps 125 dollars in $5.00 bills, and paid for the whisky. I exhibited the money and asked Pete Walker if he would take that for the whisky. I do not know either of the defendants; do not know that either of them were present. We went on home, leaving town about the middle of the afternoon. We took the Lampasas road. We passed the ten-mile post just about dark. After we had gone three hundred yards past the ten-mile post I heard three shots fired back about the ten-mile post. A few minutes afterwards I heard a wagon coming up rapidly and found that it was Mathis' wagon. Mathis was lying down in the wagon, shot. We took him home. He died about 36 hours later.

PETE WALKER, witness for the State, testified:

I know the defendant, Jim Leeper, and also Ed. Powell;
11 heard of the circumstance of Mathis being killed. On the day on which Mathis was shot I saw the defendant in the town of Gatesville. I was keeping bar for A. J. Holmes. Jim Leeper come to me and introduced himself; reminded me that I had known him years ago. He had formerly lived here, but not for quite a while. He introduced me to Powell; called his named Powell; said they were from Callahan county. Bates bought some whisky in the saloon. Defendants were both in the saloon during the day. In fact, they were there pretty much all the time, but I do not remember whether they or either of them were there when Bates

bought the whisky or not. In fact, I cannot be certain that I sold the whisky to Bates or was in the house when he bought it. Neither Powell or Leeper acted secretly or manifested any disposition to conceal themselves.

R. B. WELLS, a witness for the State, testified:

I know of the circumstance of Mathis being shot. It occurred on the night of the 17th day of December last. On the afternoon of that day I went out to my brother's pasture. I was returning from there on the Gatesville and Lampasas road, and when about two miles from Gatesville I met two men. This was about one and a half hours before sundown. I did not at the time pay any attention to them, but just as we passed one of them said, "How far is it a mile up the
12 road?" I stopped the men and asked them what they meant. I then went back to where they were and had a talk with and look- carefully at them and their horses. I saw that they were strangers. One of them was the defendant Leeper and the other Powell. Leeper was riding a bay horse and Powell a sorrel horse with a blaze in his face. The men were both in their shirt sleeves and had their coats tied on behind their saddles. There was a bulk in each coat which looked like and which I took to be a pistol, though, of course, I do not swear it was a pistol. I asked the men who they were. Leeper said, "My name is Lusk. I laid in the jail in this county six months for killing a man." I said, That can't be. I know Lusk, and you are not he. He then said, "Do you know Albert Leeper?" I said, Yes—well; and you are not he. I then said, Where are you going? He replied, "We are going as far west as this road is cut out." I said, You will go a long ways; and he replied, "Well, I want to go a long ways." I saw both parties again next day. Lanham, the sheriff, arrested Leeper in Gatesville, and I went with him and others to Buster's, where we arrested Powell. I saw in the lot before I got to the house the two horses which the parties were riding the day before. We brought Powell to town, and he rode the same sorrel horse he was on the
13 day before. We found Powell sitting on the porch. Before we arrested him I saw that his left ear was bruised and there was dry blood on it; the bruise was sufficiently large for me to see it at a considerable distance. After we brought Powell to town and placed him in jail we had him to take off his shirt and we found two large *whelps* or bruised places on his back, ranging from his left shoulder across towards his right side and downward; one of them was about four inches long and as broad as my thumb, and the other not quite so large or severe. The place at which I met the defendants was about two miles from Gatesville and was just that far from Gatesville in the direction of the place where Mathis was shot, which is southwest from Gatesville. While the defendants and I were talking W. H. H. Harvey passed us in a wagon going in the direction of Lampasas, and after we finished talking defendants left me, going in the same direction, and I came on to Gatesville.

W. H. H. HARVEY, being sworn, testified:

I knew Mathis. On the day on which he was shot he and I and others had been to Gatesville with cotton. I hauled a load of cotton for W. K. Bates, and, as I had an ox-team, I started back sooner than the others did. I suppose it was the middle of the after-
14 noon when I left Gatesville. About two miles from Gatesville, on the Lampasas road, I saw R. B. Wells talking to two men. Just as I passed them one of the men got off his horse and fixed his saddle. I saw him plainly and noticed him. The man I refer to was the defendant Powell; he was riding a sorrel horse with a blaze face. The other man I did not notice so particularly; he was riding a bay horse. I passed on, and after I had gone some two miles and passed the fork in the road at which the Brownwood road leaves the Lampasas road I looked back and saw the same men; they had stopped and were off their horses on the ground at the forks of the road. Their conduct caused me to watch them, which I did from then on. I could occasionally see them. When I got to Hard Bargain Springs, which is eight miles from Gatesville, I stopped to get some water; it was then after sundown and before dark; it was sufficiently light for me to see and recognize the men and their horses, which I did when I saw them coming up one hundred and fifty yards off. When they got up near me the man other than Powell turned his face from me and I did not get to see his face. Powell looked at me and I got a good look at him. I examined him and his horse and also the other man and his horse, though, as I have stated, I could not see
15 his face. They passed on, going in the direction of the place at which Mathis was shot. I went on as fast as I could get my oxen to travel. When I got to the nine-mile post W. K. Bates and several others passed me. I went on, and when I got about half way between the nine and ten mile post- Mathis passed me. It was then just about dark. I was going on as fast as I could, and when about 500 or 600 yards from where Mathis was shot I saw the flash of a pistol, though I did not hear the report on account of the noise made by my wagon. It took me two or three minutes to go from where I was when the shot was fired to where it was fired. I was driving all the time as hard as I could. I went on up and had just crossed the Riley branch and the ten-mile post when I saw two men sitting by the roadside. One stepped in front of my oxen and stopped them; at the same time the other man stepped to the left-hand side of the wagon and presented a pistol at me and said, "Hold up, God damn you; give up your truck." I said, All right, gentlemen; but I slipped my pocket-book out and dropped it in the wagon. Just at this time we heard horses' feet coming up rapidly from the rear. The man in front of the oxen walked round to my right and as the men, who proved to be my son Will. and Jack Bates, came up to rear of the wagon he threw his pistol on Bates and
16 told him to stop, which he did. My son rode on round to the left, and as he did so the oxen started on. The man on the left said to me, "Stop those oxen." I said all right, and got out

of the wagon. I was driving with a whip which had a handle some five or six feet long; it was about an inch in diameter at the large end and sloped down to the size of my little finger. As I got out of the wagon I turned the whip-stock and put the small end in my hand. As my son was riding by the party whom I had recognized as the defendant Powell pointed his pistol at him and said, Stop. He had turned his back to me and I struck him as hard as I could across the left side of the head, the blow glancing down on his left shoulder. I then struck him again, but this time hit him on the back. Powell then threw his hand back and shot at, but missed, me. I jumped back and the defendant shot me. The ball struck me about the hip-bone on the left side and ranged down and came out about the end of the spinal column. This knocked me down, and Powell shot me again; this shot struck me in the bottom of the foot, but I did not know it at the time. Powell and the other man then turned on Bates and my son. Presently one of them said,
"Strike that road," and Will and Bates struck off. I said,
17 Oh, Jack! and he replied, "All right, Mr. Harvey." Powell and the other man come back and turned me over, and the other man felt over my person and said, "Oh, hell! he is done for; let's go." They then left.

I recognize Powell as the man I saw talking to Wells; also as the man who passed me at Hard Bargain Springs, as the man who shot me. I cannot be mistaken as to him. The other man was just about the size and make of and looked like the defendant Leeper, but I will not swear to him positively. I noticed that one of the men was about six feet high and the other not so tall, but more heavily built. Powell is about six feet tall and Leeper is not so tall, but is heavier set.

JACK BATES, being sworn, testified:

I knew Mathis. On the day on which he was killed in Gatesville went home; was horseback; was travelling the Gatesville road. Just after I passed the nine-mile post I heard three pistol shots near the ten-mile post. I struck a lope, and when about half way between the nine and ten mile posts I came up with Will. Harvey. We then went on together in a lope until we got to where Riley branch crosses the road. We there saw Mr. Harvey's wagon. It was standing in the road. As we crossed the branch and started up to the wagon a man came around to the right and presented
18 his pistol at me and said, "Stop; give up your money." I saw him as well as I could in the dark. He came up to within a foot or two of me. I handed him my money, $3.25, and he told me to go on, which I did. The man was in his shirt-sleeves and had on a white hat with a drooped brim. About this time the other man began shooting at Harvey. I rode on, and a moment later the other man came up to Will. Harvey and told him to give up his money, which he did. They then said to us, "Strike the road." We did so. As I rode off Mr. Harvey said, "Oh, Jack!" I said, "All right, Mr. Harvey," and went on. As soon as we could

we went back and got Mr. Harvey and took him home. I saw the defendant Leeper the next day in Gatesville and took him to be the same man who presented his pistol at me the night before. He was and is about the same size; had on the same kind of a hat; had the same droop about the shoulders. From the time I heard the shots until I got to where Harvey was, was two or three or four minutes.

WILL. HARVEY, for the State, testified:

I am the son of W. H. H. Harvey; had been at Gatesville on the day on which Mathis was killed; was horseback; when about half way between the nine and ten mile posts I heard three shots fired about the ten-mile post. A moment later Jack
19 Bates came up and we went on in a lope. When we got to Riley branch we saw my father's wagon standing in the road. Just as we were coming up at the back of the wagon a man stepped out, presented his pistol at Bates, and told him to stop. He did so, but I went on, leaving the wagon to my right. As I passed by the man on the left of the wagon he turned to and presented his pistol at me and told me to stop. Before I could do so my father struck him and immediately struck him again. He then turned on and shot my father down. He then turned to me again and demanded my money, which I promptly gave him. He said to us, "Strike the road," and Jack Bates and I left. As we left my father said, "Oh, Jack," and he replied, "All right, Mr. Harvey." I did not recognize either of the men, and do not now swear positively to either of them. One of the men was a tall man about the height, size, and make of the defendant Powell. The other was a shorter, heavier man, about the hight, size, and make of Leeper.

W. M. MATHIS, a witness for the State, testified to hearing J. T. Mathis make a dying declaration, which was exactly the same as that detailed in the testimony of Dr. Baird.

J. M. LANHAM, for the State, testified:

20 I am and during last December was sheriff of Coryell county. On the day after Mathis was shot I arrested defendant Leeper here in Gatesville. Before I did so I engaged him in a conversation. I asked him, "Was you out on the Lampasas road yesterday evening?" He said, "Yes; I was." I asked him what he was doing there. He said, "I was trying to go to Mr. Buster's, but I had been drinking some and did not know where I was going. After I had gone a few miles I saw that I was wrong and come back and passed through Gatesville on my way to Buster's about sundown." Buster lives eleven miles north of Gatesville, and Mathis was shot ten miles southwest. It would be by the roads one would have to travel twenty-one miles from where Mathis was shot to Buster's. On the evening of the same day I went to Buster's and arrested Powell. Before I did so I asked him if he had been out on the Lampasas road on the evening of the previous day, and he replied that he had. I asked him what he was doing there. He said he had been drinking and thought he was going to Buster's, but

found out his mistake and came back to Gatesville about dark; that he then came on to Buster's. I then arrested him. I think that he had a bruised place on his left ear; also some blood on it,
21 which was dry and made a scab. I found in his pocket a hand-erchief with blood on it. I took him to town. He rode a sorrel blaze-face horse. The horse which he rode was the same horse whose feet were measured by the witness Largent. Thad. Buster showed me a drawer in which I found two pistols, which are the pistols now shown me. One of them is a forty-five. There are two roads from here to Buster's. On one of them there is woodland and overhanging limbs and boughs. I turned the horse which Powell rode to town over to Charles Shriber.

ALBERT LEEPER testified as follows:

I am brother of d'f't, Jim Leeper. Jim Leeper lives in Callahan county; he and Powell came from Callahan to this county on the Sunday before Mathis was killed; they came together. Powell was riding a sorrel horse, with a blaze face, and Jim Leeper a bay horse. A few days after they were put in jail I got each of the horses. Chas. Shriber got Powell's horse from Lanham. Powell's horse was shod in front and unshod behind; Jim Leeper's horse was entirely unshod.

THAD. BUSTER testified for defendants:

I was at my father's when Powell and def't Leeper, who is my cousin, came there. They came from Callahan county; they each had a pistol; they put the pistols in a drawer, which I showed
22 Lanham. The pistols which Lanham got and which are now shown me are the same pistols. I do not know whether def'ts took their pistols with them when they went to Gatesville or not. I was not at home on the night on which Mathis was killed.

CHAS. SHRIBER, for d'f'ts, testified:

I got from Jim Lanham Powell's horse—a sorrel horse, with blaze face; he was shod in front, but unshod behind.

J. V. BUSTER, for d'f'ts, testified:

I know defendants. Leeper is my nephew. They came to my house Sunday before Mathis was killed; they went to Gatesville on that day. My wife and Thad. Buster, our son, and I went to bed on that night and when we got up the next morning the defendants were there; they did not have to go through our room to get into the room in which they slept. I do not know what time they came in.

WM. REED, witness for def'ts, testified:

I was present at the place where Mathis was shot the next morning when Largent and others examined the tracks where the horses were hitched. We could not tell whether the horses were shod or

not, but when we struck the swag I thought that the tracks there made were made by shod horses.

The attorneys having failed to agree on a statement of facts in the above-entitled case, I have prepared the foregoing,
23 and I now certify that it is a true and correct statement of all the facts proven on the trial of the above-entitled cause.

Witness my official signature this the 15th day of February, A. D. 1890.

C. K. BELL,
Judge of the 29th Judicial Dist., Presiding.

Charge of the Court. Filed Feb'y 11, 1890. *M. R. Hood, Cl'k D. C., C. C., Tex.*

In District Court, Coryell County. January Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL.

GENTLEMEN OF THE JURY: By the indictment in this case the defendants, Jim Leeper and Ed. Powell, are charged with the murder of J. T. Mathis, alleged to have been committed in the county of Coryell and State of Texas on the 17th day of December, A. D. 1889, by shooting him, the said Mathis, with a pistol. To this charge the defendants have each pleaded not guilty.

You, gentlemen, are the exclusive judges of the facts proved, of the credibility of the witnesses, and of the weight to be given the testimony, but must receive the law from the court and *the* governed thereby. I will therefore now give you in charge the law as applied to the facts in this case for your guidance.

In the first place, then, the laws of this State provide—

That every person with a sound memory and discretion
24 who shall unlawfully kill any reasonable creature in being within this State with malice aforethought, either express or implied, shall be deemed guilty of murder.

All murder committed with express malice or committed in the attempt at the perpetration of robbery is murder in the first degree.

From the foregoing definition of murder you will perceive that in order to constitute the killing of one human being by another—murder—such killing must have been, 1st, unlawful, and, 2d, it must have been done with malice aforethought.

A killing of one human being by another is unlawful when contrary to or against law.

Malice, in its legal sense, means the intentional doing of a wrongful act toward another without legal justification or excuse. It (malice) is a condition of the mind which shows a heart regardless of social duty and fatally bent on mischief, the existence of which is inferred from acts committed or words spoken.

The term malice aforethought is one by which the law char-

acterizes and includes all those states of the mind under which the killing of a person takes place without any cause which will in law justify, excuse, or extenuate the homicide.

25 Express malice is where one with a sedate and deliberate mind and formed design unlawfully kills another, which formed design is evidenced by external circumstances discovering that inward intention—as lying in wait, antecedent menaces, former grudges, and concerted schemes to do him some bodily harm, or any other circumstances showing such sedate and deliberate mind and formed design unlawfully to kill or to inflict serious bodily harm which might probably end in the death of the person upon whom the same was inflicted. Express malice is never an inference of law, but is a fact which must be proved like any other fact in a criminal case.

When a homicide has been shown to be a murder the test for determining whether the murder was committed with express malice or not is, do the external facts and circumstances at the time of the killing, before or after that time, having connection with or relative to it, furnish satisfactory evidence of the existence of a sedate, deliberate mind on the part of the person killing at the time he does the act? Do they show a formed design to take the life of the person slain or do him some serious bodily harm which in its necessary or probable consequences may end in his death? If they do, the killing, if it amounts to murder, will be upon express malice.

26 As before stated, all murder committed in the attempt at the perpetration of robbery is murder in the first degree.

Hence it is necessary that you should be informed as to what constitutes robbery.

The statutes of this State provide: "That if any person, by assault or violence or by putting in fear of life or bodily injury, shall fraudulently take from the person or possession of another any property with intent to appropriate the same to his own use, he shall be guilty of robbery."

The use of any unlawful violence upon the person of another with intent to injure him, whatever be the means or the degree of violence used, is an assault and battery. Any attempt to commit a battery or any threatening gesture showing in itself or by words accompanying it an immediate intention coupled with an ability to commit a battery is an assault.

When an offense is actually committed by one or more persons, but others are present, and, knowing the unlawful intent, aid by acts or encourage by words or gestures those actually engaged in the commission of the unlawful act, such persons so aiding or encouraging are principal offenders and may be prosecuted and convicted as such.

If you believe from the evidence that the defendant, Jim Leeper, in the county and State and at or about the time alleged in

27 *in* the indictment, with express malice aforethought (as that term has been explained), shot unlawfully with a pistol and killed J. T. Mathis, the party alleged to have been killed, and that such killing amounted to murder, or if you believe from the evi-

dence that the defendant, Jim Leeper, in the county and State and at or about the time alleged in the indictment, in the attempt by assault or violence or by putting in fear of life or bodily — to fraudulently take from the person or possession of J. T. Mathis (the person alleged to have been killed) any property belonging to the said Mathis with intent to appropriate the same to his own use, unlawfully shot with a pistol and killed the said J. T. Mathis, and that the shooting and killing of the said Mathis (if he was shot and killed) constituted murder, then you will find him guilty of murder in the first degree and assess his punishment at death or confinement in the penitentiary for life.

Again, if you believe from the evidence that the defendant, Ed. Powell, in the county and State and at or about the time alleged in the indictment, with express malice aforethought, as that expression has been explained, unlawfully shot with a pistol and killed J. T. Mathis, the party alleged to have been killed, and that such killing amounted to murder, or if you believe from the evidence that the defendant, Ed. Powell, in the county and State and at or about the time alleged in the indictment, in the attempt by assault or by violence or by putting in fear of life or bodily injury to fraudulently take from the person or possession of J. T. Mathis (the person alleged to have been killed) any property belonging to the said J. T. Mathis with intent to appropriate the same to his own use, unlawfully shot with a pistol and killed the said J. T. Mathis, and that the shooting and killing of the said Mathis (if he was shot and killed) constituted murder, and if you further believe from the evidence that the defendant, Jim Leeper, was present and, knowing his unlawful intent, aided by acts or encouraged by words or gestures the said Ed. Powell in the said killing, in that event also you will find the defendant, Jim Leeper, guilty of murder of the first degree and assess his punishment as hereinbefore directed.

28

If you believe from the evidence that the defendant, Ed. Powell, in the county and State and at or about the time alleged in the indictment, with express malice aforethought (as that term has been explained), unlawfully shot with a pistol and killed J. T. Mathis (the party alleged to have been killed), and that such killing amounted to murder, or if you believe from the evidence that the defendant, Ed. Powell, in the county and State and at or about the time alleged in the indictment, in the attempt by assault or by violence or by putting in fear of life or bodily injury to fraudulently take from the person or possession of J. T. Mathis (the person alleged to have been killed) any property belonging to the said J. T. Mathis, with intent to appropriate the same to his own use, unlawfully shot with a pistol and killed the said J. T. Mathis, and that the shooting and killing of said Mathis (if he was shot and killed) constituted murder, then you will find him guilty of murder in the first degree and assess his punishment at death or at confinement in the penitentiary for life.

29

If you believe from the evidence that the defendant, Jim Leeper, in the county and State and at or about the time alleged in the in-

dictment, with express malice aforethought, as that term has been explained, unlawfully shot with a pistol and killed J. T. Mathis, the party alleged to have been killed, and that such killing amounted to murder, or if you believe from the evidence that the defend-
30 ant, Jim Leeper, in the county and State and at or about the time alleged in the indictment, in the attempt by assault or by violence or by putting in fear of life or bodily injury to fraudulently take from the person or possession of J. T. Mathis (the person alleged to have been killed) any property belonging to the said J. T. Mathis, with intent to appropriate the same to his own use, unlawfully shot with a pistol and killed the said J. T. Mathis, and that the shooting and killing of the said Mathis (if he was shot and killed) constituted murder, and if you further believe from the evidence that the defendant, Ed. Powell, was present and, knowing his unlawful intent, aided by acts or encouraged by words and gestures the said Jim Leeper in the said killing, in that event also you will find the defendant, Ed. Powell, guilty of murder in the first degree and assess his punishment as before directed.

Amongst other defenses set up by the defendants is what is known in legal phraseology as an *alibi*—that is, if the deceased was killed as alleged the defendants were at the time of such killing at another and different place from that at which such killing was done, and therefore *was* not and could not have been the persons who killed the deceased, if he was killed. Now, if the evidence raises in
31 your minds a reasonable doubt as to the presence of the defendants at the place where the deceased was killed (if killed) at the time of such killing, you will find the defendants not guilty.

Moreover, if the evidence raises in your minds a reasonable doubt as to the presence of either of the defendants at the place where the deceased was killed (if killed) at the time of such killing you will find such defendant not guilty.

The evidence in this case is circumstantial. In order to warrant a conviction of crime on circumstantial evidence each fact necessary to the conclusion sought to be established must be proved by competent evidence beyond a reasonable doubt. All the facts (that is, the facts necessary to the conclusion) must be consistent with each other and with the main fact sought to be proved, and the circumstances taken together must be of a conclusive nature, leading on the whole to a satisfactory conclusion and producing in effect a reasonable and moral certainty that the accused and no other person committed the offense charged.

Moreover, this principle of law applies to each defendant when more than one is on trial. If, therefore, you can account for
32 or explain the facts and circumstances which you find from the evidence to be true upon any reasonable theory or hypothesis consistent with the innocence of either of the defendants, then as to such defendant you may find a verdict of not guilty.

The defendants are each presumed to be innocent until his guilt is established by legal and competent evidence; and if you have a reasonable doubt of their guilt they are entitled to be acquitted, and if you have a reasonable doubt of the guilt of either of the de-

fendants, then as to such defendant you must render a verdict of not guilty.

C. K. BELL,
Judge Presiding.

Filed February 11th, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } Special Charge Requested by Defendants.

The jury are instructed that the burden of proof of the identity of the defendants as the parties who committed the offense (if any was committed) devolves upon the State, and this issue, like every other issue in the case, must be proved beyond a reasonable doubt, and unless you find from the evidence that these defendants are so identified you should acquit them.

J. E. THOMAS,
Att'y for Def'ts.

33 The foregoing charge is allowed.

C. K. BELL,
Judge Presiding.

Bill of Exceptions No. 1. *Filed Feb'y* 14, 1890.

In District Court, Coryell County, Texas. Jan. Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Be it rem-bered that on the 6th day of February, 1890, the above entitled and numbered cause was called for trial and the defendants, Jim Leeper and Ed. Powell, in open court, presented and read to the court the following application asking for a continuance of said cause, to wit:

In District Court, Coryell County, Tex. Jan. Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Now come the defendants, Jim Leeper and Ed. Powell, in the above entitled and numbered cause, and state, under oath, that Mrs. M. E. Buster, Thomas Buster, Sherman Hoover, John Jolly, and Bud Campbell are witnesses in their behalf in this cause and are absent from the court; that said witnesses, Mrs. M. E. Buster, Thomas Buster, and Sherman Hoover, reside in Coryell county, Texas; that the witness Jno. Jolly resides in Coleman county, Texas; that the witness Bud Campbell resides in Dickens county,

Texas; that these defendants have used due and sufficient diligence to procure the attendance of Mrs. M. E. Buster, Thomas Buster, and Sherman Hoover as witnesses in their behalf herein, to wit,
34 that on the 23d day of January, A. D. 1890, defendants procured from the clerk of this court a subpœna for said witnesses, which was placed in the hands of the sheriff of this county on said day, and that said subpœna was afterwards, to wit, on the 4th day of February, A. D. 1890, returned into this court endorsed as follows:

Came to hand on this the 23d day of January, A. D. 1890, and executed on the 3d day of February, A. D. 1890, by reading the within subpœna in the hearing of J. V. Buster and Mrs. M. E. Buster (Thomas Buster and Sherman Hoover not found in Coryell Co.), the within-named witnesses. Returned on this the 4th day of February, A. D. 1890.

(Signed) J. M. LANHAM.

Which subpœna is hereto attached and asked to be considered as a part hereof; that to procure the attendance of the witnesses John Jolly and Bud Campbell the defendants, on the 25th of January, applied for and obtained attachments to the respective counties, to wit, for witness John Jolly, to Coleman county, Texas, and for witness Bud Campbell, to Dickens county, Texas, which county being unorganized and attached to Crosby county for judicial purposes, the attachment was sent to Crosby county; that said attachments were issued by the clerk of this court on said day and were forwarded to the sheriffs of said counties by due course of
35 mail, and the attachment for said Campbell has been returned in this court and is hereto attached, and asked that it, with its endorsements thereon, be taken as a part hereof; that the attachment for the witness Jolly has not yet been returned in this court.

That the facts that these defendants expect to prove by the witness Mrs. M. E. Buster are as follows: That these defendants came to her house, a distance of ten or more miles north of the town of Gatesville, Texas, some time before or near the hour of nine o'clock on the night of the alleged murder and remained there during the night; that the State will rely upon circumstantial evidence to connect these defendants with the commission of the offense charged, and that the State will prove that the murder was committed about ten or more miles S. W. of Gatesville, Texas, and at about seven o'clock in the evening, a distance of twenty or more miles from the residence of the witness Mrs. M. E. Buster.

By the witness Thos. Buster defendants expect to prove that they were not armed with their pistols, but that they had left them at the residence of Mr. Buster on the morning of the day of the alleged murder; that the State will prove and identify pistols as the property of defendants that were gotten on the day after the murder by the officers of Coryell county, Texas, as Mr. Buster's.

36 By the witness Sherman Hoover def'ts expect to prove that he found the def'ts and John Jolly between the town of Gates-

ville, Texas, and the four-mile spring, north of Gatesville and on the road leading to Mr. Buster's, about seven or half past seven o'clock on the evening of the alleged murder.

By the witness John Jolly def'ts expect to prove that he, Jolly, met them on the evening of the day of the alleged murder about one mile north of Gatesville, Texas, and that he accompanied them as far as the four-mile spring, north of Gatesville, and that they stopped there while talking; that he went on and left defendants there; that this was just at dark when he met up with them; that, as they were going along riding, defendant Powell got his ear hurt by the rebound of a limb or branch of a tree by the roadside, which was drawn forward by either the horse of or person of def't Jas. Leeper, and that they stopped at said spring to get water, and that it was not later than half past seven o'clock at night when he there parted with these defendants; that the State will prove, as a means of identification, that in the commission of a collateral offense subsequent to the alleged murder, in the commission of which there were two participating, that one of the two was wounded about the head or the face.

37 That the evidence as above set forth of each and all of said witnesses is material to these defendants.

That by the witness Bud Campbell the defendant, Ed. Powell, expects to prove that he was in the employ of said witness for three years, and that during that time he had a good reputation and was peaceable, quiet, trustworthy, reliable, and honest; that said witnesses nor either of them are not absent from this court by the procurement or consent of these defendants, and that this application is not made for delay; that there is no reasonable expectation that the attendance of all of said witnesses can be secured during the present term of said court by a postponement of the trial to some future day of the present term of this court; that this is defendants' first application for continuance; wherefore the defendants move the court to continue this cause to the next term of this court.

E. D. POWELL.
JAS. LEEPER.

Sworn to and subscribed before me by Jas. Leeper and Ed. Powell. the defendants in the above entitled and numbered cause, on this the 6th day of February, A. D. 1890.

M. R. HOOD,
Clk D. C., C. C., Tex.

Subpœna.

The State of Texas to the sheriff or any constable of Coryell county, said State, Greeting:

38 You are hereby commanded to summon J. V. Buster, Mrs. M. E. Buster, Thos. Buster, and Sherman Hoover to be and appear before the honorable district court of Coryell county, Texas, at Gatesville, in said county, *instanter* on Feb'y 6th, and there to testify as a witness in behalf of the defendants in a certain action

pending in said court entitled and numbered on the criminal docket of said court The State of Texas *v.* Jim Leeper & Ed. Powell, No. 1451.

Herein fail not and make due return hereof.

Witness my official signature on this the 23d day of Jan'y, A. D. 1890.

M. R. HOOD,
Cl'k of Dist. Court, Coryell Co., Texas,
By J. W. BIRKHEAD, *Deputy.*

Sheriff's Return.

Came to hand on this the 23d day of January, A. D. 1890, and executed on this the 3rd day of February, A. D. 1890, by reading the within subpœna in the hearing of J. V. Buster & Mrs. M. E. Buster, Thos. Buster and Sherman Hoover not found in Coryell Co., the within-named witness-.

Returned on this the 4th day of Feb'ry, A. D. 1890.

J. M. LANHAM.

Attachment.

The State of Texas to the sheriff or any constable of Dickens county, said State, Greeting:

You are hereby commanded to take the body of Bud Camp-
39 bell and bring him before the district court of Coryell county, at the court-house, in Gatesville, in Coryell county, Texas, forthwith on the 6th day of February, 1890, then and there to testify as a witness in behalf of the defendants in the case of The State of Texas *v.* Jim Leeper & Ed. Powell, No. 1451, pending before said court.

Herein fail not and due return make of this writ on or before the 6th day of February, 1890.

Witness my signature and seal of office this the 25th day of Jan., 1890.

M. R. HOOD,
Cl'k Dist. Court, Coryell Co., Tex.,
By J. W. BIRKHEAD, *Deputy.*

Sheriff's Return.

Came to hand on the 27 day of Jan., 1890; returned this 27th day of Jan., 1890. Bud Campbell, the within-named witness, is in Coleman Co., and will be there till about Feb. 15th, 1890.

J. W. STANDEFER,
Sheriff Crosby Co., Tex.

And the court refused to grant said application, and required the defendants to proceed with the trial of the cause; to which decision and order of the court the defendants then excepted, and tender this bill of exceptions, and ask that the same be signed and filed as a part of the record in this case.

The foregoing bill of exceptions is allowed, with the ex-
40 planation that the district attorney admitted, as shown in the statement of facts, that the witness Campbell would testify as claimed in the application for a continuance, and that such facts were in fact true.

C. K. BELL,
Judge Presiding.

Bill of exceptions No. 1.
Filed Feb'y 14, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

Bill of Exceptions No. 2. Filed Feb. 14, 1890. *M. R. Hood, Cl'k D. C., C. Co., Tex.*

In Dist. Court, Coryell Co., Texas. Jan'y Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Be it remembered that on the 6th day of Febr'y, A. D. 1890, the above-entitled and numbered cause was called for trial, and, the special venire returned for that day having been exhausted, *and* the court then ordered that an unlimited number of talesmen be summoned as jurors in this case, to be returned on the 8th day of February, A. D. 1890, which was accordingly done, and eighty-six jurors' names were returned into court upon said day; whereupon defendants presented to the court their motion to quash said venire in words and figures as follows:

In District Court, Coryell County, Tex. Jan'y Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Now come the defendants in this cause and move the court to quash the venire in this cause returned into this court on
41 this the 8th day of February, A. D. 1890, for the following reason, to wit:

Because the sheriff, although present in court, was not sworn and instructed, cautioned and directed, by the court — the manner in which said venire should be by him selected, as required by law.

Defendants therefore pray that the same be quashed.

(Signed) J. E. THOMAS,
Att'y for Def'ts.

Which motion was by the court overruled; to which ruling of the court defendants then and there excepted, and tender this bill of exceptions and asks that the same be signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is allowed, but — desire to state the facts on which it is permitted more fully:

After the jurors summoned under the special venire had been exhausted without obtaining a jury I notified the sheriff that it would be necessary to summon talesmen. He stated that he was sick, but that two of his regular deputies would summon the jurors. I then swore and cautioned the deputies in the manner required by law, and instructed them to summon the talesmen, and it was from the talesmen so summoned by the deputies who had been sworn and cautioned that the jury was made up. The sheriff did not summon any of the talesmen.

C. K. BELL,
Judge Presiding.

In District Court, Coryell County, Texas. Jan'y Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

42 *Bill of Exceptions No.* 3. *Filed Feb.* 14, 1890. *M. R. Hood, Cl'k D. C., C. Co., Tex.*

Be it remembered that upon the trial of this cause as above entitled and numbered the State introduced the following testimony, to wit: E. J. Bates, a witness for the State, was permitted to state that at a rock crossing near the ten-mile post on the road from Gatesville to Lampasas he was held up by two men, one of whom was bareheaded, in his shirt-sleeves, with vest on and handkerchief over his face, and the man resembled the defendant, Jim Leeper. The other man resembled defendant Powell. They took my money away from me; they were both armed with pistols; the defendant Powell resembles the man who just afterwards shot W. H. H. Harvey, a witness in this cause. The man that resembled the defendant Leeper held his pistol on me and demanded my money, and I gave it to him. This was the night of December 17, 1889. Will. Harvey was with me and Mr. W. H. H. Harvey was also there. And by witness Will. Harvey the same facts were also proven, and that he, too, was robbed on same night at same place, but could not identify the parties. By W. H. H. Harvey in substance the same facts, with the further fact that he was shot once and wounded, and that at another time the ball hitting his foot or shoe and glancing off, from both of which wounds he suffered great pain, and from the one entering his hip he has not yet recovered; that the defend-
43 ant, Ed. Powell, shot him on that night, and afterwards that both parties felt over his person for his money. Which evidence was objected to by the defendants at the time it was offered upon the following grounds, to wit:

That it was evidence of extraneous matter of separate and distinct offenses committed subsequent to the one for which def'ts were upon trial and was inadmissible and did not relate to or connect the de-

fendants with the crime for which they were then upon trial; and the court overruled said objections and admitted said testimony; to which decision of the court the defendants then excepted and tender this bill of exceptions and asks that the same be signed and filed as a part of the records in this cause.

The foregoing bill of exceptions is allowed, but with this explanation, that the circumstances, proof of which is complained of, were, as shown in the statement of facts, a part of the *res gestæ* to the killing of Mathis, and it was upon this theory that the evidence was admitted. The proof was limited to such facts as in the judgment were strictly a portion of the *res gestæ*.

C. K. BILL,
Judge Presiding.

Bill of exceptions No. 3.
Filed Febr'y 14th, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

44 *Bill of Exceptions No. 4.*

In District Court, Coryell Co., Tx. Jan'y Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED POWELL. } No. 1451.

Be it remembered that upon the trial of the above entitled and numbered cause the State introduced the following testimony, to wit: That upon an inspection of defendant Ed. Powell's body after he had been arrested and put in jail that his shirt was taken off by the jailer and marks or bruises were found thereon, on the back of his neck and near the point of the shoulder-blade upon the left side, indicating that he had been struck one or more blows; to which evidence defendants then and there objected because the same was compelling defendant to testify against himself, and that, being in custody, any marks found upon him could not be given in evidence, the same being violative of the bill of rights, and the court overruled said objections and admitted said testimony; to which decision of the court the defendants then excepted and tenders this bill of exceptions and asks that the same be signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is allowed.

C. K. BELL,
Judge Presiding.

Bill of exceptions No. 4.
Filed Febr'y 14th, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tx.

45 *Bill of Exceptions No. 5.*

In the Dist. Court of Coryell Co., Tx. Jan'y Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Be it remembered that upon the trial of the above entitled and numbered cause the court, in its written charge delivered to the jury, failed to charge all the law applicable to and demanded by the facts in the evidence in this: The evidence raises the issue of drunkenness. The charge is therefore defective in not charging the law pertaining to murder in the second degree; and the defendants at the time of said trial excepted to said charge because of the above-mentioned defect therein, and they tender this bill of exceptions and ask that the same be signed and filed as a part of the record in this cause.

The foregoing bill of exceptions is allowed.

C. K. BELL,
Judge Presiding.

Bill of exceptions No. 5.
Filed Feb'ry 14th, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

Motion for New Trial. Filed Feb'y 12, 1890.

In the Dist. Court, Coryell Co., Texas. Jan'y Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Now comes the defendants, Jim Leeper and Ed. Powell, in the above entitled and numbered cause and move the court to grant them a new trial in this cause by setting aside the verdict and judg-
46 ment herein rendered against them on the 12th day of February, A. D. 1890, for the following causes, to wit:

1st. Because the court erred in overruling defendants' application for a continuance.

2nd. Because the court erred in compelling defendants to select jurors from a venire of talesmen who had been ordered summoned by the court after the special venire had been exhausted, and the sheriff, being in court, was not sworn, as required by law, before said talesmen had been summoned.

3rd. Because the court committed a material error calculated to injure the rights of the defendants in the admission of the evidence of witnesses R. B. Wells and Jas. Lanham as to wounds and bruises found upon the person and body of defendant, Ed. Powell, he having been compelled to submit to an inspection and examination of

his body by a removal of his clothing and after he was arrested and while he was confined in jail, thus compelling him to give evidence against himself.

4th. Because the court erred in the admission of evidence of witnesses E. J. Bates, Will. Harvey, W. H. H. Harvey as to the participation of these defendants in the commission of two other separate and distinct crimes committed subsequent to the one with which they were in this cause charged and for the commission of which they were not upon trial. Said evidence, being prejudicial to the rights of these defendants, was calculated to and did mislead the jury in arriving at their verdict in this
47 case.

5th. Because B. F. Smith, a juror who tried this cause and joined in the rendition of said verdict, has been guilty of corrupt conduct in relation to said cause and verdict, to wit, said juror answered upon his *voir dire* that he was not a householder in Coryell county, Texas, but that he was a freeholder in the State of Texas, which statement in relation to his being a freeholder in the State of Texas, as a matter of law, was not true, as will be seen by the attached affidavit of said B. F. Smith and a copy of his application to pre-empt same, which affidavit and copy of application are here asked to be taken and considered as a part of this motion, said foregoing fact being one of which neither of the defendants therein no their counsel was *not* cognizant at the time of trial, and were only apprised of that fact after the trial had closed, as will be seen by attached affidavits of the defendants in this cause and their attorney, which affidavits are asked to be considered a part hereof.

48 6th. Because owing to the disqualification of said juror the defendants have not had a trial in accordance with law.

7th. Because the verdict is contrary to law and the evidence.

J. E. THOMAS,
Att'y for Def'd'ts.

Affidavit of B. F. Smith.

In Dist. Court, Coryell Co., Texas. Jan'y Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Before me, the undersigned authority, personally came B. F. Smith, to me well known, who, being by me first duly sworn, upon oath, deposes and says that he was empanneled and sworn and sat as a juror in the trial of cause No. 1451, in the district of Coryell county, State of Texas, wherein The State of Texas is plaintiff and Jim Lepeer and Ed. Powell are defendants, and that he was one of the jurors who returned a verdict in that case; that he is not a householder in said Coryell county, Texas, and that he owns no freehold in the State of Texas in fee simple; that on May the 8th, A. D. 1889, he filed upon a tract of land which he supposed to be and now believes is public domain; that he filed upon the same as

a pre-emption; that he has never had the land surveyed, and has taken no further steps in regard thereto except to file with
49 the county surveyor of Coryell county his application for a survey thereof; that he lived on said tract of land for about six months; that he does not live now upon it and has not resided upon it for the past three months; that all the title he has in and to the said real estate is what he has acquired by virtue of his said application for said survey and his possession as aforesaid.

B. F. SMITH.

Subscribed and sworn to before me this Feb'y 12th, 1890.

[L. S.] M. R. HOOD,
Cl'k Dist. Court, Coryell Co., T'x's,
By J. W. BIRKHEAD, *Deputy.*

Affidavit of Def'ts.

In Dist. Court, Coryell County, Tx. Jan'y Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Now come the defendants, Jim Leeper and Ed. Powell, in the above entitled and numbered cause, and, being first duly sworn, upon oath depose and say that at the time of the impanneling the jury for the trial of this cause they were unacquainted with the juror, B. F. Smith, who was regularly impanneled as one of the jurors for the trial hereof; that they had never prior thereto had any acquaintance with him, and that they nor either of them knew that he was not a freeholder in the State of Texas at the time he was impaneled as a juror in the trial of this cause, and have
50 only and for the first time been apprised of this fact since the rendition of the verdict in this case, and that they did not know at the time of said trial that said juror was disqualified to try said case as a juror.

JAS. LEEPER.
ED. POWELL.

Subscribed and sworn to before me this Febr'y 12th, A. D. 1890.

[L. S.] M. R. HOOD,
Cl'k D. C., C. C., Tex.,
By J. W. BIRKHEAD, *Deputy.*

Affidavit of J. E. Thomas, Att'y for Def'ts.

In District Court, Coryell Co., Texas. Jan'y Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Before me, the undersigned authority, personally came J. E. Thomas, to me well known, who, being by me duly sworn, upon

oath deposes and says that he was the attorney in the above entitled and numbered cause and represented the defendants, Jim Leeper and Ed. Powell, in the trial thereof; that he was present at the selection and impanneling of the jury in this cause and represented the defendants in said selection; that the defendants were represented by no other attorney; that he, affiant, was not at that time nor any time prior thereto acquainted with the juror, B. F. Smith, who was regularly impanneled to try and who did sit as a juror in the trial of this cause, and that at the time said juror was so
51 impanneled affiant says he did not know that he, B. F. Smith, was not a freeholder in the State of Texas, which fact affiant states he has since ascertained and only since the trial of this case has closed, and that he did not know at the time of said trial that said juror did not possess the requisite qualifications of a juror.

J. E. THOMAS.

Sworn to and subscribed before me this the 12th day of Febr'y, A. D. 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tx.

STATE OF TEXAS, }
County of Coryell. }

To the county surveyor of Coryell county, Texas:

By virtue of the accompanying affidavit, made in accordance with arts. 3926 and 3927, Revised Statutes, and under provisions of "An act for the relief of actual occupants of the public lands, approved April 24th, A. D. 1879," I, B. F. Smith, hereby apply for a survey of the following-described premises, to wit, eighty acres situated about 17 miles S. E. of the town of Gatesville, Coryell county, Texas: Beginning at R. R. Brashears' S. W. corner, thence S. 19° W. 436 vrs., thence S. 71 E. 1,035 varas, thence N. 19 E. 436 varas to S. E. corner of R. R. Brashears, thence N. 71 W. to the place of beginning; and I further state that I claim the same for myself
52 in good faith under the laws governing land to pre-emptors; that I am a citizen of the State of Texas and eighteen years of age; that I am not the proprietor of one hundred and sixty acres of land in this State; that I have no residence or land of my own, and that I have actually settled upon the land which I claim, and that I believe the same to be vacant and unappropriated public domain.

(Signed) B. F. SMITH, *Applicant.*

THE STATE OF TEXAS, }
County of Coryell. }

Before me, the undersigned authority, personally appeared B. F. Smith, who, being my me duly sworn according to law, deposes and says that the above and foregoing statement is true and correct.

(Signed) B. F. SMITH, *Applicant.*

4—1239

Sworn to and subscribed before me this 8th day of May, A. D. 1889.

In testimony whereof I hereunto affix my official seal and signature.

[SEAL.]

M. R. HOOD,
Cl'k Dist. Court, Coryell Co., Texas,
B- J. W. BIRKHEAD, *Deputy.*

I, C. L. Graves, county surveyor of Coryell county, Texas, do hereby certify that the foregoing is a true and correct copy, together with the endorsement thereon, of the application and affidavit for pre-emption of B. F. Smith, now on file in my office and duly
53 recorded in Book A, page 307.

Given under my hand this 14th day of February, 1890.

C. L. GRAVES,
Co. Surveyor,
By D. A. HAMMACK,
Special Deputy.

Motion for new trial.
Filed Feb'y 12th, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

Contest of Motion for New Trial. Filed Febr'y 14th, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Before me, the undersigned authority, this day personally appeared B. F. Smith, who, being by me duly sworn, upon oath says that he was one of the twelve jurors that tried the case of The State of Texas *vs.* Jim Leeper & Ed. Powell, and that he returned a verdict of guilty of murder in the first degree and assessed the death penalty against both the defendants; that said verdict was returned in the honorable district court of Coryell county the 12th day of February, 1890. The said Smith further states that he answered on his examination on *voir dire* in this case to the question whether he was a freeholder in the State or a householder in this county that "he was." The said Smith states that he is an unmarried man, and that on the 8th day of May, 1889, he filed on 80 acres of land, being vacant public domain, situated in Coryell county, Texas; that he was occupying the same before and at the time he made said file on
54 same, and that he continued to live on said land until about six months after said file, at which time affiant engaged in cutting cedar some two miles distant from said land; that he left said land temporarily for the purpose of cutting cedar, and during the time he was so engaged in cutting cedar he ate and slept at T. G. Ellison's residence in order to be near his work; that his intention of returning and occupying said land was never abandoned. Further affiant says he regarded and treated said land as his home. When he left said land he left a wagon bed and other property upon said

land, and that before he went to cut cedar he bought part of the lumber for building a house on said land with the intention of using the same for that purpose, and that it is now affiant's purpose to improve said land and to complete his occupancy thereof.

B. F. SMITH.

Sworn to and subscribed before me this the 12th day of February, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

THE STATE OF TEXAS, }
County of Coryell. }

On this day personally appeared before the undersigned authority J. M. Lanham, who, being first duly sworn, on his oath says that he is sheriff of Coryell county and was sheriff of said
55 county on the 18th day of December, 1889, and that on said date he arrested the defendant, Ed. Powell, at the house of J. V. Buster, about ten miles northeast from Gatesville, Coryell county, Texas, and that at said time he had a conversation with Mrs. J. V. Buster, in which she, the said Mrs. Buster, stated that she retired to bed the night of the 17th of December at an early hour, and that the next morning she saw the defendants, Jim Leeper and Ed. Powell, at her house, but that she did not know at what time the said defendants came to her house; that the said defendants were not at her house when she retired on said night, and she didn't hear them when they came to the house if they came to said house during the night.

J. M. LANHAM.

Subscribed and sworn to before me by J. M. Lanham this 14th day of February, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

In Dist. Court, Coryell County, Texas. January Term, 1890.

THE STATE OF TEXAS }
vs. } No. 1451.
JIM LEEPER & ED. POWELL. }

Now comes the State and takes issue with the defendants upon the truth of the causes set forth in their motion for new trial filed herein and denies all and singular the truth of the causes therein set forth, and in support hereof attaches the affidavits of J. M. Lanham
56 and B. F. Smith hereto and makes the same a part of this contest.

JNO. P. ESTES,
District Attorney, 29th Judicial Dist.

Contest of motion for new trial.
Filed Feb'y 14th, 1890.

M. R. HOOD,
Cl'k D. C., C. C., Tex.

In District Court, Coryell County, Texas. Jan'y Term, A. D. 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Now come the defendants, by their attorney, and moves the court to strike out plaintiff's answer contesting defendants' application for new trial, because the same is based upon a statement that was made by another and made in the absence of defendants, and not made under oath. Wherefore they pray the court that the same be stricken out.

J. E. THOMAS,
Attorney for Defendants.

Motion to strike out contesting answer.
Filed Feb'ry 14th, 1890.

M. R. HOOD,
Clk D. C., C. C., Tex.

Judgment on Motion for New Trial.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

FEB'Y 14TH, 1890.

This day came on to be heard the motion of the defendants, Jim Leeper and Ed. Powell, to set aside the verdict and judgment herein rendered and grant them a new trial of this cause, and the
57 State being present in court, by her district attorney, and the defendants, Jim Leeper and Ed. Powell, being present in court in person, and the court, having heard the said motion and the evidence thereon submitted, is of the opinion that the same should be refused.

It is therefore considered, ordered, and adjudged by the court that said motion for a new trial herein be, and the same is, refused and in all things overruled.

Whereupon the defendants, Jim Leeper and Ed. Powell, in open court gave notice of an appeal herein to the court of appeals of the State of Texas; which said notice is here now entered of record:

Assignment of Errors. Filed Feb. 15, 1890. *M. R. Hood, Cl'k D. C., C. Co., Tx.*

In District Court, Coryell County, Texas. Jan'y Term, 1890.

THE STATE OF TEXAS
vs.
JIM LEEPER & ED. POWELL. } No. 1451.

Assignment of errors.

I.

The court erred in overruling defendants' application for continuance.

II.

It was error to impanel as jurors the talesmen summoned by order of the court, the sheriff not having been sworn, as required by law.

III.

It was error to admit evidence of the commission of separate and independent crimes as having been committed by these defendants.

58

IV.

It was error to admit evidence of wounds and bruises found upon def't Powell's body by inspection while he, the def't, was in custody and in jail.

V.

It was error in the court to admit evidence of extraneous crimes committed by defendants which were different, distinct, and separate from the one for which defendants were upon trial and had been committed subsequent thereto.

VI.

The court erred in not limiting and restricting the evidence of extraneous crimes to the objects and purposes for which alone they were or could be admitted.

VII.

The court erred in failing to instruct the jury how far and for what purpose they should consider evidence relating to other crimes as having been committed by these defendants, which error is here assigned as fundamental.

VIII.

The court erred in not granting defendants a new trial.

IX.

The court erred in omitting in its charge to the jury the law pertaining to murder in the second degree.

J. E. THOMAS,
Att'y for Def'ts.

59 THE STATE OF TEXAS, }
County of Coryell. }

I, M. R. Hood, clerk of the district court of said county, do certify that the foregoing transcript contains a true copy of all the proceedings in said above entitled and numbered cause.

[SEAL.] Witness my signature and seal of office on this the 18th day of March, A. D. 1890.

(Signed) M. R. HOOD,
Clerk of the District Court of Coryell County, Texas.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, said State, do hereby certify that the above and foregoing fifty-eight (58) pages contain a true and correct copy of the original transcript of the record in cause entitled "The State of Texas *vs.* Jim Leeper and Ed. Powell," and numbered 1451 on the docket of the district court of Coryell county, Texas, which said original transcript is endorsed in this court as follows: "No. 6936, Jim Leeper & Ed. Powell *vs.* The State of Texas, from the district court of Coryell county," and which transcript was filed in this said court of appeals, at Austin, on the 9th day of May, A. D. 1890, and is still on file in my office.

60 Seal Court of Appeals of Texas.

In testimony whereof I hereunto set my name and affix the seal of the court of appeals of Texas, at Austin, this the 14th day of July, A. D. 1890.

P. WALTON, *Clerk.*

Order of Submission.

In Court of Appeals of Texas.

JIM LEEPER & ED. POWELL } No. 6936. Appeal from
vs. Coryell County.
THE STATE OF TEXAS. }

MAY 21ST, 1890.

Submitted on oral arguments and briefs for both parties.

Opinion of the Court of Appeals.

JIM LEEPER & ED. POWELL } No. 6936. Appeal from
vs. Coryell County.
THE STATE OF TEXAS. }

Over defendants' objections the State was permitted to prove that

a few minutes after the deceased, Mathis, was attacked and shot, and at the same locality, Bates and the two Harveys were assaulted by two persons; that the elder Harvey was shot by said two persons and severely but not mortally wounded; that one of said two persons making said assault was the defendant Ed. Powell, and that the other one resembled the defendant Leeper; that said assault was made by said two persons for the purpose of robbing the persons assaulted. Defendants reserved a bill of exceptions to the
61 admission of this testimony, from which it appears that the learned trial judge admitted it upon the ground that it was *res gestæ* of the assault made upon Mathis, the deceased.

We coincide with the trial judge in his view of the testimony. The assaults upon Bates and the two Harveys were almost simultaneous with the previous assault made upon Mathis, and were made at the same place. Robbery was manifestly the motive actuating the assailants. They had deliberately planned the robbery of the parties assaulted, and had laid in wait for them at the place where the assaults were committed. Each of the assaults was a part of the general scheme—a part of the conspiracy to rob the person assaulted. They were so closely connected with, related to, and illustrative of each other as to make each *res gestæ* of the other. This testimony was essential to identify the parties who assaulted and shot Mathis and to show the motive and intent of such assault. It bore directly upon the main issue in the case, and was not extraneous matter within the meaning of the rule which requires that the jury should be instructed to restrict their consideration of extraneous matter adduced in evidence to the specific purpose for which it was admitted. (McKinney *v.* State, 8 Appls., 626; Willson's Crim. Stats., § 2344.)

62 We hold that said testimony was admissible, and that it was not required that the court should instruct the jury as to the purpose for which it was admitted, and to limit their consideration of it to such purpose. Furthermore, the main, if not the sole, reason of the rule which requires the court to restrict the jury in the consideration of extraneous matter admitted in evidence does not obtain in this case. Defendants were being prosecuted for the murder of Mathis by shooting him immediately before the attack was made upon Bates and the Harveys. It was conclusively proved that Mathis died within a few hours from the effect of that shooting. None of the other parties assaulted were killed; hence the jury could not have been influenced or misled by the testimony relating to the assaults upon Bates and the Harveys to convict the defendants of those assaults. It is not clear to the mind of the writer that in such case, even if the matter admitted in evidence was extraneous, that it would be error to omit to give an instruction limiting its consideration by the jury. It would be better practice, perhaps, in such case to give such an instruction; but it is not necessary that this question should be here determined.

It is made to appear by another bill of exception that after
63 the defendant, Ed. Powell, had been arrested and placed in jail his shirt was taken off his body by the jailer and marks

or bruises were found upon his body, indicating that he had been struck one or more blows. This testimony was objected to by the defendant upon the ground that it was compelling the defendant to testify against himself. We do not think that the bill of exception shows that any error was committed in this matter. It does not appear that the defendant was compelled to expose his body, that his shirt was removed without his consent, nor is it shown by the bill of exception what injury or prejudice might have been caused said defendant by the admission of said testimony. In the manner in which this ruling of the court is presented by the bill of exception it does not appear that any material error, if error at all, was committed. (Willson's Crim. Stats., § 2368.)

There is but one bill of exception reserved to the charge of the court, and that is that it does not instruct as to the law where a homicide is committed by a person who at the time is in a state of intoxication. We are of the opinion that such instruction was not demanded by the evidence. There is no evidence in the record that the defendants were drunk at the time of the homicide. On
64 the contrary, the evidence shows that the homicide was deliberately committed by persons who evidently were in possession of their full mental powers and whose purpose was to rob, even at the expense of human life. The defendants object to the charge of the court upon circumstantial evidence. No objection was made to this portion of the charge in the court below. While the last sentence of the said portion of the charge may not be correct and should have been omitted, still the error, if error it be, was not, in view of the evidence in the case and of the preceding portion of said charge, calculated to mislead the jury or in any manner to injure the rights of the defendants. If said portion of the charge had been excepted to we are not prepared to say that we would hold it to be free from error.

With respect to the absent testimony set forth in defendants' application for a continuance it is apparent, we think, in view of the evidence adduced on the trial, that said testimony was not probably true. Hence the refusal of the application for a continuance does not afford good ground for a new trial. (Willson's Crim Stats., § 2186.)

It is made a ground for a new trial in the motion that B. F. Smith, who served on the jury in the trial of the cause, was not a householder in the county or a freeholder in the State.
65 When tested upon his *voir dire* as to his qualifications to serve as a juror said Smith answered the question, "Are you a householder in the county or a freeholder in the State?" affirmatively, and defendants and their counsel state under oath that at the time of accepting said juror they were ignorant of his disqualification, and did not ascertain that fact until after the conclusion of the trial. We will not stop to inquire into and determine the question as to the competency of the juror, for the reason that the mere disqualification of the juror is not a valid ground for a new trial. It is not a statutory ground (C. C. P., art. 777). In order to constitute it a good ground for new trial it must be further made to ap-

pear that probable injury has resulted to the defendant by reason of such juror having served upon the trial (O'Mealy *v.* State, 1 Apps., 180; People *v.* State, 6 Cr. Law Mag., p. 334 and note).

There are some decisions of this court which hold to the contrary of the rule above stated (Armendares *v.* State, 10 Apps., 44; Boren *v.* State, 23 Apps., 28; Brackenridge *v.* State, 27 Apps., 513; Lester *v.* State, 2 Apps., 432). These decisions are not, we think, after a more thorough consideration of the question, consistent with the statute, and we therefore overrule them in so far as they
66 hold that the mere disqualification of a trial juror is of itself good ground for a new trial, it not being shown that probable injury has been done the defendant by reason of the disqualified juror serving in the case. In this case it is not shown or even pretended that the juror Smith was not an impartial juror. No fact is made to appear which raises the slightest suspicion of the fairness of the jury which tried the case.

We hold that the court did not err in refusing the new trial because of the disqualification of said juror, even if he was disqualified.

We find the evidence amply sufficient to warrant the conviction and to justify the extreme penalty of the law.

There is no error apparent of record for which the conviction should be disturbed, and it is therefore affirmed.

SAM. A. WILLSON,
Judge Court of Appeals.

Judges all present and concurring.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the foregoing opinion is a true and correct copy of the original delivered in cause No. 6936, Jim Leeper & Ed. Powell, appellants, *v.* The State of Texas, appellee, in said court.

67 Seal Court of Appeals of Texas.

Witness my hand and the seal of said court of appeals this the 14th day of July, A. D. 1890.

P. WALTON, *Clk.*

Endorsed: No. 6936. Jim Leeper & Ed. Powell *vs.* The State. Appeal from Coryell Co. Opinion by Sam. A. Willson, J. Affirmed. Filed in court of appeals May 24, 1890, at Austin, Tex. P. Walton, clerk.

Judgment of the Court of Appeals.

JIM LEEPER & ED. POWELL, Appellants, *vs.* THE STATE OF TEXAS, Appellee. } No. 6936. Appeal from Dist. Court Coryell Co.

Opinion by Willson, J.

This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the

opinion of this court that there was no error in the judgment of the district court of Coryell county, it is therefore ordered, adjudged, and decreed that said judgment be in all things affirmed. It is further ordered that this decision be certified below for observance.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the above is a true and correct copy of the judgment rendered by said court in cause # 6936, Jim Leeper and Ed. Powell, appellants, *vs.* The State of Texas, appellee, as the same appears of record on page 281 of the minutes of this court under date May 24th, A. D. 1890.

Seal Court of Appeals of Texas.

68 Witness my hand and the seal of said court, at Austin, this 14th day of July, A. D. 1890.

P. WALTON, *Clerk.*

Motion for Rehearing.

In the Court of Appeals of the State of Texas. Austin Term, 1890.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS. } No. 6936.

Now come the appellants and move the court to vacate and set aside the judgment of affirmance rendered and entered herein on Saturday, the 24th day of May, A. D. 1890, and grant a rehearing of this cause for the following reasons, to wit:

First. Because the court erred in holding as sufficient in substance and sustaining the bill of indictment in this case, the said bill of indictment, as is apparent on its face, not alleging all of the material elements of the crime of murder in the first degree or of any other crime, and for that reason being illegal and in contravention of the constitution of the State of Texas and of the United States, of which these appellants are now and were at the time of their trial and conviction native and *bona fide* citizens.

69 Second. Because the record in this case discloses many other errors fundamental in their character and prejudicial and injurious to appellants, and which for these reasons ought to have been, but were not, looked to and considered by the court in arriving at the judgment of affirmance rendered and entered herein as aforesaid.

Third. Because the court erred in ruling and holding that the action of the trial court in refusing to grant appellants a new trial on the ground that B. F. Smith, one of the jurors who tried the case of appellants, was not at the time a lawful and qualified — was not reversible error.

Fourth. Because the court erred in ruling and holding that portion of the charge of the trial court not reversible error wherein the jury was charged and instructed as follows: "If, therefore, you can account for or explain the facts and circumstances which you

find from the evidence to be true upon any reasonable theory or hypothesis consistent with the innocence of either of the defendants, then, as to such defendants, you must find a verdict of not guilty;" and the court erred in ruling and holding that said portion of said charge was not, in view of the evidence in the case and of
70 the preceding portion of said charge, calculated to mislead the jury or in any manner injure the rights of the appellants, and because the court erred in ruling and holding that it was necessary for appellants to have reserved an exception to said portion of said charge of the trial court before this court could look to and consider the same as reversible error.

Fifth. Because the court erred in ruling and holding that the action of the trial court in refusing, when requested so to do by appellants, to charge the jury on the law applicable to murder in the second degree or homicide committed by a person who is at the time in a state of intoxication, and which refusal so to charge was at the time excepted to, was not reversible error.

Sixth. Because the court erred in ruling and holding as correct and as not fundamental and reversible error that portion of the charge of the trial court in this case wherein he said to the jury, "I will therefore now give you in charge the law as applied to the facts in this case for your guidance." The language here employed by the trial court was a clear assumption on his part that the evi-
dence had established certain facts inculpatory of appel-
71 lants, to which he had applied the law. This language used by the trial court in his charge to the jury was fundamental error and necessarily prejudicial and injurious to the most sacred rights of the appellants and subversive of the prerogative of the jury as the sole judges of the evidence and sole determiners of the facts established thereby.

Seventh. Because the court erred in ruling and holding that the action of the trial court overruling appellants' motion to quash the special venire of talesmen summoned in said case, because the sheriff was not sworn and instructed as required by law, notwithstanding he was present in court at the time said venire of talesmen were by the court ordered, was not reversible error, the same having been excepted to by appellants.

Eighth. Because the court erred in affirming said judgment of conviction when the record disclosed the fact that there was an eye-witness to said homicide within the jurisdiction of the trial court who was not introduced as a witness at the trial, nor any reason assigned or explanation given why such witness was not introduced. The evidence of such eye-witness would surely have been entitled to be classed as "the best evidence," and not to produce it at the
trial or assign a good and sufficient reason for the failure to
72 do so was calculated to and probably did prejudice and work injury to the rights of appellants; and such failure on the part of the State to introduce as a witness at said trial the son of the deceased, whom the record discloses was in company with his father at the time the latter was shot, and who was, as further disclosed by the evidence, the only living eye-witness of the homicide at the

time of the trial of appellants, was "unexplained," an error so glaring as to fully justify the court on its own motion and in the interest of justice in reve-sing said conviction.

Ninth. Because the court erred in ruling and holding that the action of the trial court in overruling the application for appellants for a continuance, which action was excepted to, was not reversible error.

Tenth. Because the evidence on which said conviction was based was insufficient, vague, inconsistent, uncertain, unreliable, much of it palpably untrue, for the reason that physical facts rendered it impossible for it to be true, and the court, it is insisted with great deference, erred to the prejudice of the sacred rights of appellants in holding it "conclusive of their guilt."

Eleventh. The court erred in holding as competent the evidence showing that bruises were found upon appellant Powell's
73 person when the jailer made him remove his shirt, and the court erred in holding as competent, without limitation, the evidence proving other and subsequent crimes

Appellants state that the names of the opposing counsel in this cause are the attorney general, Vardiman, White & Taylor, and McDowell and Miller, who reside at Gatesville, Coryell county, Texas, and appellants pray that notice of this motion be served in accordance with law.

J. E. THOMAS,
Att'y for Appellants.
G. P. M. TURNER,
Att'y for App'ts.

Waiver of Time & Acceptance of Service.

I hereby accept service and waive time and agree to the submission of the motion.

W. L. DAVIDSON,
Ass't Attorney General.

May 28, 1890.

Endorsement: Motion No. 41. 3d assignment. No. 6936. Leeper & Powell *vs.* The State of Texas. Motion for rehearing. Filed in court of appeals at Austin, Texas, May 28, 1890. P. Walton, clerk.

Order Submitting Motion.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS.
} No. 6936. From Coryell County.

MAY 31, 1890.

Motion for rehearing submitted on briefs and oral arguments for both parties.

74 *Order Overruling Motion for Rehearing.*

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS. } No. 6936. From District Court, Coryell Co.

Opinion on motion by Willson, J.

This day came on to be heard the motion of appellants for a rehearing in this cause, and, the same being considered, it is ordered that said motion be overruled.

(Judge Hurt dissents and files an opinion.)

Opinion of the Court Overruling Motion for Rehearing.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS. } No. 6936. Appeal from Coryell County.

On motion for rehearing.

A majority of the court adheres to the opinion heretofore rendered. Judge Hurt dissents from that portion of the opinion which holds that the mere disqualification of the juror Smith does not constitute good grounds for a new trial, and will deliver a dissenting opinion. He concurs in other views expressed in the original opinion. We shall therefore confine our discussion to the question as to whether or not the disqualification of said juror, if in fact he was disqualified, entitles the defendants to a new trial.

We shall not enter upon an investigation and review of authorities, for whatever may be the common-law rule or the rule established by the decisions of other States, we consider that in the de-
75 cision of this question we must be controlled by our statute.

In this State for more than thirty years we have had a Penal Code and a Code of Criminal Procedure, which, having been carefully prepared by distinguished, experienced, and able jurists, were adopted by the Legislature. These codes have been pronounced by the bench & bar of our State to be the most perfect system of criminal laws ever devised. It is declared to be the design of the Penal Code "to define in plain language every offense against the laws of this State and affix to each offense its proper punishment" (P. C., art. 1). It is declared that the Code of Criminal Procedure "is intended to embrace the rules applicable to the prevention and prosecution of offenses against the laws of this State and to make rules of proceeding in respect to the prevention and punishment of offenses intellig-ble to the officers who are to act under them and to all persons whose rights are to be affected by them" (C. C. P., art. 1).

We regard it as the imperative duty of this court and of all other courts of this State in the trial and determination of causes to be

guided and controlled by the statutes of the State whenever there is a statute applicable to the question presented. Our observation is that many errors have crept into the decisions of the courts
76 of this State, especially in criminal cases, by following common-law rules and decisions of other States, overlooking our own statutes. These errors should be corrected whenever detected and a strict adherence to the statutes should be the rule governing courts in their decisions.

With respect to new trials in felony cases our Code of Criminal Procedure is specific, plain, and emphatic. It provides that "new trials in cases of felony shall be granted for the following causes and no other." Then follows an enumeration of the causes for which a new trial shall be granted. None of the causes enumerated embrace as a ground the disqualification of a trial juror. What authority, then, has a court to grant a new trial for such cause? If such authority exists, it is certainly not conferred by any express provision of the statute, nor do we think that it is impliedly conferred. One of the statutory grounds for a new trial is, "Where the court has misdirected the jury as to the law or has committed any other material error calculated to injure the rights of the defendant" (C. C. P., art. 777). Under this subdivision the error committed must be a material one calculated to injure the rights of the de-
77 fendant. Is it error for a person who is not a householder or a freeholder to serve upon a jury? Not necessarily. Such person is not an illegal juror to the extent that his presence upon the jury will vitiate the verdict. Such disqualification is merely a cause for challenge. If challenged by the defendant it would be error to not sustain the challenge, but such error would not be material unless calculated to injure the rights of the defendant. In such case this court would not set aside the conviction unless it was made to appear that the defendant exhausted his peremptory challenges and was compelled to accept an objectionable juror (Willson's Crim. Stat., § 2293).

In the case we are considering the juror was not challenged by the defendant. The juror having, by his answer under oath, shown that he was qualified, the court could not do otherwise than require the parties to pass upon him. Was this error? But if error, was it material error? It is not shown or pretended that the juror was not fair and impartial. It was not shown that he was corrupt—had been convicted of any felony or was under indictment for felony, or that he was insane, or had such bodily or mental defects as rendered him unfit for jury service, or that he had been guilty of
78 any misconduct as a juror. How, then, can it be said that his being a juror in the case was calculated to injure the defendant? Does the mere fact that a jury does not have a house or does not own land in this State render it probable that he would not try an accused person fairly and impartially? True, it is the policy of the law that jurors shall be either householders in the county or freeholders in the State, but we do not believe that this policy is founded on the supposition that the non-householders and non-freeholders in our State are morally unfit to serve as jurors. We think the

reason of the policy is to induce men to become permanent citizens; to identify their interests with the interests of the State; to add to the prosperity of the community in which they are by having homes and by owning and cultivating lands and paying taxes thereon.

In conclusion, we will say that we rest our decision of this question upon our statute. We think the statute is not only plain, but mandatory, that a new trial in a felony case should not be granted because of the disqualification of a trial juror, although such disqualification was unknown to the defendant at the time of the trial, and although such want of knowledge was not because of any
79 fault on the part of defendant or his counsel.

The motion for rehearing is overruled.

SAM. A. WILLSON,
Judge Court of Appeals.

Hurt, J., dissents.

Endorsement: No. 6936. Leeper & Powell *vs.* The State. Opinion on motion for rehearing. Filed in court of appeals, at Austin, Texas, June 25, 1890. P. Walton, cl'k.

Dissenting Opinion on Motion for Rehearing.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS. } No. 6936. Mo. No. 41.

On motion for rehearing.

I desire to discuss but one question. B. F. Smith, a juror, was neither a householder in the county of the trial nor a freeholder in the State. He was examined touching these facts and on his *voir dire* qualified himself by swearing that he was a freeholder in the State. That he was not a freeholder was unknown to appellants or either of them or to their counsel. The fact that he was neither a householder or freeholder was ascertained after the verdict.

Under the above state of facts counsel for appellants, upon the ground that Smith was neither a householder or freeholder, moved for a new trial. This motion was overruled. Was this error?
80 In the Criminal Law Magazine (vol. 6, page 336) will be found a note to the opinion of Chief Justice Cooley in the case of People *vs.* Scott. This note was written by Mr. Eugene McQuillin. In this note will be found two propositions—(1) "The fact that a recognized cause of challenge existed at the time of the empanneling and was not discovered until after verdict will not, *per se*, constitute a ground for new trial;" (2) whether a new trial will be granted for this reason rests largely in the sound discretion of the court. The facts of each case must direct the judicial discretion.

"The essential question is one of prejudice to the prisoner. Have any legal rights been denied him? The error must be of the essence of his rights. Has the proceeding resulted in an unjust verdict?"

Before discussing these propositions we desire to notice our statutes on this subject. Art. 3009 provides that all male persons over 21 years of age are competent jurors unless disqualified under some provision of this chapter.

Art. 3010: "No person shall be qualified to serve as a juror who does not possess the following qualifications: 2nd. He must be a freeholder within the State or a householder within the county."

Now, if these were all the statutory provisions bearing upon
81 this subject we would hold that a juror lacking these qualifications would be disqualified in the largest sense—that is, if such a juror were to be empanneled the jury—the panel—would be illegal; there would not be a jury at all. The panel would be composed of but eleven men.

But art. 636, C. C. C., provides: "A challenge for cause is an objection made to a particular juror, alleging some fact which renders him incapable or unfit to serve on the jury. It may be made for either of the following reasons: '(2.) That he is neither a householder in the county nor a freeholder in the State.'"

Art. 639: "No juror shall be empanneled when it appears that he is subject either to the third, fourth, or fifth cause of challenge in art. 636, although both parties may consent." The third clause is "that he has been convicted of theft or any felony;" fourth, "that he is under indictment or other legal accusation of theft or any felony;" fifth, "that he is insane or has such a defect in the organs of seeing, feeling, or hearing or such bodily or mental defect or disease as renders him unfit for jury service."

If such a person or persons as are described in these clauses were
empanneled the jury would be illegal—no jury—and hence
82 without authority to render a legal verdict. Such persons cannot be empanneled. This is expressly forbidden by the statute, though the parties may consent thereto.

We are of the opinion, from a comparison of the different provisions of the statutes bearing upon this subject, that unless the juror is subject to some cause of challenge named in clauses 3, 4, and 5 of art. 636, he is not an illegal juror; that, if empanneled, the jury thus composed would not be without authority to render a legal verdict. Hence, if the objection to the juror be that he is neither a householder nor a freeholder, this would be ground for challenge for cause; but if such a juror served the verdict would be legal. It would be the act of a legal jury; and so a jury, one member of which had formed an opinion that the accused was guilty and should be convicted, would be a legal jury (clause 13, art. 636). So with a jury including a member who was a non-voter in the State and county (clause 1, art. 636).

But does it follow that because a jury thus composed is a legal jury that therefore the empanneling of such a juror under no circumstances would not taint the verdict so as to require a new trial to be granted in the case?

The law-making power of the State declares that no person,
83 unless a householder in the county or a freeholder in the State, shall be qualified to serve as a juror. It also declares

that for the want of this qualification either party may challenge the juror. While a jury composed of a person who is neither a householder nor a freeholder may be a legal jury, with authority to render a legal verdict—a verdict which is not absolutely void—still, under certain circumstances, may not a verdict rendered by such a jury be voidable? If so, under what circumstances?

We will return to Mr. Eugene McQuillan's note. The propositions stated by him and inserted above are quite general and are wanting in specification. The first, that the fact that a cause of challenge existed at the time of the empannelling and was not discovered until after verdict, will not *per se* constitute a ground for new trial. This proposition may or may not be correct. If the cause of challenge was such as rendered the juror incapable of serving on a jury, such as are enumerated in clauses 3, 4, and 5 in art. 636, then the empannelling of such a juror would be ground *per se* for new trial; and while it may be true that the empanneling of a juror obnoxious to challenge for cause, though the cause was not discovered
84 until after verdict, may not *per se* be ground for new trial, this writer does not say that under no circumstances would the empanneling of such a juror be ground for new trial.

We admit the correctness of the rule, as above stated, but it is of little value to us in solving the question in hand. If, under certain circumstances, the empanneling of such a jury may be ground for a new trial the question is, What must those circumstances be to authorize a new trial?

Suppose the juror is questioned by the court, by the defendant or his counsel, and he under oath qualifies himself by stating that he is a freeholder in the State; that defendant and his counsel did not know to the contrary; that this fact was *was* discovered after verdict, under the provisions of the statutes of this State would these circumstances demand a new trial? Before answering this question we desire to notice the authorities referred to by Mr. McQuillan in support of his first proposition. About forty cases are cited. We have examined each of said cases, with but few exceptions, and we have not found a case in which it is held that a new trial will not be granted under the facts which present the question in this case. In fact, no case in the list cited contains a similar state of facts. After giving those cases a thorough examina-
85 tion, we are prepared to state that more than two-thirds of them simply decide that as the juror was not tested by the court or defendant regarding the cause for challenge it is too late after verdict, and for this reason the new trial was refused.

In some cases the new trial was refused for the reason that the defendant or his counsel knew of the cause of challenge before the juror was empanelled or because the motion did not negative such knowledge, but in most of them the new trial was refused expressly for the reason that the juror was not tested on *voir dire*. Now, what the ruling on the motion for new trial would have been under the facts attending the question in this case we are not informed, but it is reasonable to infer that the motion would have prevailed. Why?

1. Because it was unnecessary—yea, foolish—to enter into a con-

test over the evidence adduced bearing upon the fact as to whether the juror had been tested or not, as was done in several cases.

2. When the motion came up for the ruling of the court it would have been a sufficient reason for rejecting it for the court to say, "No injury shown, and that is the test." This would in a great many cases have eliminated from the motion all evidence offered for
86 the purpose of showing that the juror had or had not been examined touching his qualifications as to the cause of challenge relied on for new trial (Dilworth *v.* Comm., 12 Grat., 686). The issue, injury *vel non*, would have been the first to decide and then inquire as to diligence, but in none of these cases is the question of injury to the defendant discussed except in cases where the cause of challenge was bias or prejudice, or that the juror had before trial formed an opinion against defendant.

At common law the rule was that no juror could be challenged by the defendant without consent after he had been sworn unless it be for some cause happening after he was sworn; that the challenge *propter defectum* should be made as the juror is brought to the book to be sworn. If not then made the defendant waives his challenge, and this rule was applied in Davis *v.* State (80 N. C.), the facts being that one of the jurors was an atheist, which was not discovered by the prisoner until after verdict. In that case we are not informed whether the prisoner or his counsel knew of the cause of challenge before the juror was sworn or whether the juror was examined on this disqualification or not. The common-law rule cited seems to have been quite broad and would have denied the rights to
87 the prisoner to urge as a ground for new trial any disqualification of a juror without regard to the diligence used by the prisoner or any other fact. If the juror had formed as settled opinion that the accused was guilty, had been questioned as to such an opinion, had under oath denied that he entertained any opinion as to the guilt of the prisoner, and if the prisoner and his counsel had been ignorant of such opinion, still, under the rule cited, there was no relief for the prisoner. We will not stop to discuss such a rule, remarking, by the way, that it does not obtain in any State of the Union.

Now, we desire to state the rules which are applicable to the different state of facts which may ordinarily surround this question:

1. If a person is incapable of being a juror under any circumstances a jury with such a person as a member would not be a legal jury, and a verdict by a jury thus formed would be absolutely void. The prisoner could attack the verdict in a motion for new trial whether he knew of the disqualification or not or whether he examined the juror touching such disqualification or not.

2. The juror being obnoxious to challenge for cause, as in this case, if the prisoner knew of the cause and failed to urge it before the jury is sworn, or if the juror was not examined touching
88 his qualification, though the cause was not known to the prisoner or his counsel, he is presumed to have waived his objection and will not be allowed to urge the disqualification for new trial. Our supreme court holds that if the juror had formed

an opinion against the accused or was prejudiced against him he will not be deprived of the right to insist upon this as a ground for new trial, though he did not examine the juror upon his *voir dire* as to his prejudice when the jury was being empanneled (—— *v.* State, 21 Tex., 526; —— *v.* State, 41 Tex., 573).

3. If the juror is disqualified and is subject to challenge for cause, is examined on his *voir dire*, qualifies himself, his disqualification being unknown to the prisoner and his counsel, the defendant can urge the disqualification as a ground for new trial (Shumaker *v.* State, 5 Wis., 324). In the case cited the juror was disqualified because an alien, and it also appears that he had not been examined on that fact (Gilloly *v.* State, 58 Ind., 182, 183). In this case the court say: So if the defendant accepts a juror without questioning him as to his qualification he cannot afterwards object that the juror was neither a freeholder nor a householder, both statutory qualifications, but if on his *voir dire* such juror misleads the court and parties as to such qualifications and is accepted as a juror the defendant is entitled to a new trial. To the same effect is
89 Patterson *v.* State, 70 Ind., 431.

This question is elaborately discussed by Messrs. Graham and Waterman, in their work on New Trials, in reviewing the case of Briggs *v.* George (15 Vt., 6). After verdict for defendant the plaintiff moved for a new trial on the ground that one of the jurors who sat in the trial of the case was not a freeholder, which fact plaintiff did not know at the time, the statute requiring jurors to be freeholders. A new trial was granted upon this ground alone. Judge Bennett dissented. His dissent rested mainly upon these grounds: that the objection to the juror was not such as affected his character or impugned the fairness and impartiality of the trial and no injury shown. Replying to these objections, the authors say: "The assumption of the learned judge who delivered the dissenting opinion in the foregoing case that the objection to the juror was not such as affected his character or impugned the fairness and impartiality of the trial is deprived of all its force from being in direct contradiction to the law. The statute, by excluding such persons from the panel as do not possess certain prescribed qualifications, impliedly declares that those who enter the jury-box without them are unfit to serve, nor can the parties be presumed to know whether the officers charged with summoning jurors have complied with the necessary formalities and selected only such persons as are declared
90 by law to be competent. They have a right to suppose that the officers have done so; nor would they be likely in the first instance to suspect to the contrary. If, therefore, they are — apprised of such objection until after verdict, they cannot justly be charged with negligence or be deemed to have waived their rights. Unnumbered evils would flow from permitting courts to practically annul statutes by refusing to be guided by them under the plea that it would make no difference with those for whose protection or benefit the statute was designed. Were such a course pursued the justice and propriety of a statute, rather than the statute itself, would come to be regarded by the courts, and the latter would arrogate to them-

selves the right to obey or disobey the law, according as it should meet their approbation or the reverse. The law declaring that no person who is not a freeholder shall serve upon juries is founded upon grounds of public policy, which demands that persons exercising so important a duty shall be owners of the soil, and, therefore, bound to law and order by pecuniary interest, and is intended as an additional guarantee to suitors that their rights shall be adjudicated upon and decided by responsible persons who have themselves something at stake and are dependent upon the
91 correct administration of justice for the preservation of their own rights; but whether such a law be sound and wholesome or the contrary, we cannot see that in principle it differs from other statutes regulating the trial of causes; that courts have any more right to treat it as a dead letter, or that parties are to be precluded from availing themselves of it either after or before the verdict. It is true that where the cause has been fully and fairly tried on the merits the ordering of another trial is practically unnecessary, imposes great hardship upon the successful party, consumes the time of the court, multiplies litigation, and endangers justice. But still the upholding and observance of the law is superior to all these considerations, and the least departure from it is so fraught with dangerous consequences as to render it imperative upon those charged with the administration of justice vigilantly and jealously to guard against every deviation."

In the above case the juror was not tested, the learned authors holding that this was not required, as the parties have the right to suppose that the officers have done their duty by selecting
92 only such persons as are declared by law to be competent. The case is directly in point, though a civil case. In that cause a very important fact was omitted. The juror was not examined as to whether he was a freeholder. In the case now before us this was done. In the Briggs case the disqualification was not fatal to the panel. So we have admitted in this case. No injury in the Briggs, nor can one be shown in this case, unless a deprivation of a legal right be an injury. See also State *v.* Babcock, 1 Conn., 401.

But it is contended that injury must be shown. If this be so the discussion ends. If this be correct thousands of pages would not have been written upon the doctrine of waiver. See this doctrine discussed in G. & W. New Trials, p. 220, vol. 2. Read the discussions upon this doctrine in not less than a hundred cases in the library too numerous to be inserted here. Now, why enter into elaborate arguments relating to the failure to examine the juror as to whether he was a freeholder, householder, citizen, voter, an atheist, &c., &c., if a new trial could not be granted unless *inquiry* is shown? It is absolutely impossible to show injury because a non-freeholder sat on the jury.

93 But it may be urged that if the juror was prejudiced or had formed an opinion against the prisoner injury would be shown and a new trial would be granted. The new trial would be granted because of the prejudice or opinion, not because the juror was not a freeholder. This disqualification for want of a freehold

would have nothing to do with the motion. The merits of the motion would rest upon the prejudice or opinion, not the other cause.

Just here we submit some observations regarding the second proposition of Mr. McQuillan. He says that injury must appear, and refers us to a number of cases for support of the rule. When these cases are consulted it will be found that the objection to the juror was prejudice or opinion against the prisoner. Now, in passing upon the motion for new trial the courts, after hearing the evidence bearing upon the prejudice or opinion, decide the question of prejudice or opinion formed just as is done if the juror had been questioned on *voir dire* and answered, stating the condition of his mind, or just as the question would have been decided upon
94 the evidence adduced when *when* the juror was being tested. If the juror was not prejudiced or had not formed such an opinion as would render him partial the challenging for cause would have been overruled. So when this matter is brought forward in a motion for new trial. In discussing this question it is frequently stated that no injury appears to the prisoner. Now, in a few cases, among which is found the dissenting opinion of Bennett, J., in the Briggs case, the absence of injury is urged as a reason for refusing a new trial, the objection to the juror being a want of freehold; but in the overwhelming majority of cases the reasons for refusing the new trial are (1) knowledge of the cause for challenge when the juror was empanneled, (2) failure in the motion to negative knowledge, (3) objection waived because the prisoner knew of the disqualification or failed to examine the juror touching his disqualification relied on for new trial.

Were the appellants deprived of a legal right, and, if so, can they avail themselves of their rights by motion for new trial? Before answering this question we desire to observe that as the appellants and their counsel were ignorant of the disqualification when
95 the juror was empanneled, and as the juror, on oath, qualified himself by stating that he was a freeholder, no laches can be attributed to them, and hence the doctrine of waiver is not applicable. The appellants occupy the same position as they would have done if the juror had stated that he was neither a freeholder nor householder and the appellants had challenged him for cause and the court had overruled the challenge. Why? Because, being ignorant of the cause for challenge, and having used all diligence required of them in reason and in law, and being misled, whether ignorantly or corruptly, they certainly cannot be held to have waived their right to demand a qualified juror.

Our statute excludes from the panel a person who is neither a householder or freeholder, thus impliedly declaring that those who enter the jury-box without these qualifications are unfit to serve. In this case the appellants, without any fault on their part or on the part of their counsel, have been tried by a juror declared to be unqualified and unfit to try them. Such persons are placed by the State, through her law-making power, under a very dark cloud.

They are badly treated. They are not suspected merely, but
96 emphatically declared unfit to try a case; and while it may be true that the disqualification is not such as affects his character and impugns the fairness and impartiality of the trial, still they have been deprived of a legal right without fault.

This being the case, have they relief by motion for new trial? It is contended that our code forbids the granting of a new trial for this cause unless injury is shown. Let us examine this proposition. This should be a practical question; and if this rule is to be applied to this question it should be applied in all cases. Injury must be shown before a new trial will be granted. What is meant by injury? Must there be injury in fact or in law? If in fact let us extend the rule to other phases of this subject and to distinct subjects.

Let us suppose the juror had disqualified himself by answering that he was neither a householder nor a freeholder, and the appellants had challenged him for this cause and the court had overruled their challenge, and the juror had sat in the case—that the appellants objected, reserving their bill. This matter being brought forward on motion for new trial, should their motion for new trial prevail?
97 By no means if actual injury must be shown, because no injury appears and cannot possibly be made to appear. Take another illustration. The prisoner challenges "A" peremptorily. The court overrules the challenge and a bill is reserved. Can he obtain relief by motion for a new trial? Not if he must show actual injury. In neither of the supposed cases can he obtain relief by motion in arrest, because there is no defect in the indictment. Again: Suppose he moves to quash the special venire in a capital case; his motion is well taken, but overruled, and he excepts. What is his remedy? In motion for new trial? No. Why? No actual injury is shown. In motion in arrest? No; because no defect in indictment.

Now, it will not be denied, in the cases put, the prisoner would be entitled to new trial. Upon what ground? Simply, that without fault on his part he has been deprived of a legal right. Hence in law there is a legal injury for which he has a legal remedy. If these propositions be incorrect, then, in the language of the authors of "New Trials," "the justice and propriety of statutes, rather than the statute itself, would come to be regarded by courts, and the latter would arrogate to themselves the right to obey or disobey the
98 law according as it should meet their approbation or the reverse."

In conclusion, upon this subject we desire to observe that while it may be true "when a case has been fairly tried upon its merits a new trial may appear practically unnecessary, imposing great hardships upon the successful party, consuming the time of the court, multiplying litigation, endangering justice, and liberating in many cases persons who are evidently guilty of the most atrocious crimes—yea, bloody-handed assassins—still the observing of the law is superior to all these considerations, and the departure from it is so fraught with dangerous consequences as to render it imperative

upon those charged with the administration of justice vigilantly and jealously to guard against any deviation."

Concede the appellants are guilty of murder of the first degree; concede that they have been tried by an impartial jury; concede that they deserve the severest punishment known to our law, still they have not been tried by such a jury as is guaranteed to them by this State, who is the complainant in this case. The plaintiff in the case, The State, by the law-making power declares that unless a householder or freeholder a person is not fit to try her citi-
99 zens. Without fault, laches, negligence of any kind these appellants have been tried by a juror who is thus condemned and repudiated by the plaintiff, The State. They have not been tried legally, but illegally. They have thus been tried without fault on their part. They have been denied a legal right. The certainly should have a legal remedy, which is a new trial.

The writer was misled by Mr. McQuillan's note, and was as much responsible for the opinion in this case as Judge Willson, who wrote it, but after having most thoroughly examined the cases cited in the note I am clearly satisfied that we were wrong and that a rehearing should be awarded and the judgment reversed.

J. M. HURT, *Judge.*

Endorsement: No. 6936. Leeper & Powell *v.* State. Dissenting opinion on motion for rehearing. Filed in court of appeals, Austin, Texas, June 25, 1890. P. Walton, clerk.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the above and foregoing pages, beginning at 68 and here ending, contain a true copy of the original motion for rehearing in cause # 6936, Jim Leeper & Ed. Powell, appellants, *vs.* The State of Texas, appellee, together with the order of submission and
100 order overruling said motion, the original opinion of this court on said motion, with the dissenting opinion of Hurt, J., and the respective endorsements on said papers, all of which are of record in this court.

Seal Court of Appeals of Texas.

Witness my hand and the seal of said court of appeals, at Austin, this 14th day of July, A. D. 1890.

P. WALTON, *Clerk.*

Bill of Exceptions.

In Court of Appeals. Austin Term, A. D. 1890.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS. } No. 6936.

Be it remembered that upon the final adjudication of this cause and after the rendering and entering the judgment of this court therein defendants, through their counsel, gave notice in open court of an appeal to the Supreme Court of the United States of America,

and requested that the same be entered upon the minutes of this court, which action this court then and there refused; to which ruling defendants then and there, by their counsel, excepted, and now tender this their bill of exceptions and pray that the same be taken and filed as a part of the records in this case.

Allowed & ordered filed as part of the record in this cause.

JNO. P. WHITE,
P. J. Court of Appeals of Texas.

101 Endorsement: No. 6936. Jim Leeper & Ed. Powell *v.* The State of Texas. Bill of exceptions. Filed in court of appeals, at Austin, Texas, June 28, 1890. P. Walton, cl'k.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the foregoing is a true and correct copy of the bill of exceptions filed by defendants in the cause No. 6936, Jim Leeper & Ed. Powell, appellants, *vs.* The State of Texas, appellee, with the order of this court allowing same.

Witness my hand and the seal of the said
Seal Court of Appeals of Texas. court of appeals, at Austin, this 14th day of July, A. D. 1890.

P. WALTON, *Clerk.*

Petition for Writ of Error.

To the Honorable John P. White, presiding judge of the court of appeals of the State of Texas:

Your petitioners, Jim Leeper and Ed. Powell, most respectfully represent and complain that in the records and proceedings and in the rendition of a judgment in a certain cause, numbered 6936 and entitled Jim Leeper and Ed. Powell *vs.* The State of Texas, lately brought by an appeal from the honorable district court of
102 Coryell county, State of Texas, before the honorable court of appeals of the State of Texas, rendered in said court of appeals on the 24th day of May, A. D. 1890, and also in the subsequent proceedings had therein, in which was overruled your petitioners' motion for rehearing of said cause by judgment rendered by a majority of said court on the 25th day of June, A. D. 1890, and in the refusal of said court to enter upon its records notice of appeal made in open court of said cause to the Supreme Court of the United States, all of which appears in and forms part of the records of this cause, there is manifest error, copies of said judgments and motion for new trial being hereto attached and marked respectively Exhibits A, B, C, & D, the latter being bill of exceptions to action of court in refusing to enter notice of appeal, all of which exhibits are asked to be considered as a part hereof.

Your petitioners respectfully represent that the errors of which they complain and which are manifest in the records of this case consist of the following:

First. The fifth amendment to the Constitution of the
103 United States provides that "No person shall be held to answer for a capital or otherwise infamous crime unless on a presentment or indictment of a grand jury, and that section ten of the bill of rights, article first, of the constitution of the State of Texas, adopted A. D. 1876, and now in force as the organic law of the State of Texas, contains a similar provision; that the word or term indictment, as used both in the United States and State constitutions, has a legal significance and had a meaning well known, understood, and recognized at the time of the adoption of each of said constitutions; that the Legislature of the State of Texas, on the 26th day of June, A. D. 1881, enacted a law, section eleven of which, especially that portion known as form number two—in which a form is given for the charging part of the offense of murder in the first degree, which form is repugnant to and in contravention of the above-stated constitutional inhibition. Your petitioners complain that they were put upon trial, tried, and convicted, with death penalty assessed against each of them, under an indictment formed and drawn under or in accordance with said form number
104 two; that the elements of murder, for which your petitioners have been tried and convicted, are not set forth in the said indictment; that the said indictment under which they were tried contains not a single essential element to charge the offense of murder in the first degree; that the act constituting the offense, as charged in said indictment, is not therein charged with having been done either unlawfully, willfully, premeditatedly, with express malice, or in the act of perpetrating another offense, and, as therein charged, charges no offense whatever, and that having been tried thereunder your petitioners have not in their trial been accorded due process of law, nor have they been by reason thereof accorded, but have been denied, the equal protection of the laws as accorded to other citizens of the State of Texas and the United States as guaranteed to them by the fourteenth amendment of the Constitution of the United States.

Second. Your petitioners allege that under the sixth amendment to the Constitution of the United States they were entitled to a trial by a jury, which right, privilege, and immunity was denied them in the trial of this case; that section thirteen, article five, of
105 the constitution of Texas provides for a jury of twelve men in all cases of the grade of felony; that the Code of Criminal Procedure provides in article twenty-two thereof that no person can be convicted of a felony except upon the verdict of a jury, and art. 636, same Code, set forth fourteen challenges for cause; that in the trial of your petitioners they were tried by a juror who was, under said article, disqualified to serve as a juror, which fact was to your petitioners at that time unknown. Petitioners claim that it was their inherent right as citizens to be tried by a jury of twelve men who possessed the legal qualifications; that they in no sense waived that right; that they accepted as true the answer of the juror that he possessed the requisite qualifications; that they raised and presented the question, after discovering that the juror was disqualified,

at the first possible time they could; that they were ignorant of the disqualifications of said juror during the trial, and that having been tried thereby they have been legally injured by having been deprived of a legal right; that a jury composed of less than twelve men is not a jury at all that could render a verdict in this case, and that by reason of the disqualification of one of the panel
106 petitioners complain that they have been denied a trial by an impartial jury or a jury of any kind—a right, privilege, and immunity awarded to them as citizens of the United States under said amendment 6th to the Constitution of the same; and, further, that by reason thereof they have not been accorded due process of law.

Third. Petitioners further allege that under article —, fifth amendment to the Constitution, the further right is guaranteed to them, in common with all other citizens of the United States, that they shall not be compelled to witness against themselves. Petitioners complain that the right given, as above stated, was invaded in the trial of their case in the compulsion of petitioner Powell to remove his shirt while in jail and submit to an inspection of his person and then to permit the result of such inspection to be given in evidence upon the trial; that the same was doing and permitting to be done indirectly precisely what the above clause prohibits, and that by reason thereof they were denied a right or a right of theirs was abridged in violation to said article of said Constitution.

Fourth. Petitioners further allege that under subdivision
107 first, section 2d, art. 3d, Constitution of the United States, they are given the right of appeal to the Supreme Court of the United States, which right, they allege, has been denied them, and that in the denial and refusal thereof they have not been accorded the equal protection of the laws with other citizens of this State and the United States.

Fifth. Petitioners further allege that there was in the trial of said cause drawn and called in question the construction of certain clauses of the Constitution of the United States, and the decision of said cause was adverse and against the rights, privileges, immunities, and exemptions so especially set up and claimed under those clauses of the said Constitution of the United States, and that by reason thereof manifest error hath happened, to the great damage of your petitioners.

That the said court of appeals is the highest court of law or equity in the State of Texas in which a decision could be had in the said cause. Wherefore your petitioners, the said Jim Leeper and Ed. Powell, pray for the allowance of a writ of error and such other process as may cause the same to be corrected by the Supreme Court of the United States, and pray for such other and further relief to which they may be entitled either in law or equity.

J. E. THOMAS,
108 *Attorney for Jim Leeper & Ed. Powell.*

AUSTIN, TEXAS, *July 1st*, 1890.

The above and foregoing petition was presented to me in cham-

bers this day, and I approve the same as embodying substantially the points raised on the appeal of Leeper and Powell in the court of appeals of Texas, and I allow it to that extent.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

EXHIBIT "A."

JIM LEEPER & ED. POWELL *vs.* THE STATE. } No. 6936. Appeal from Coryell County.

Over defendants' objection the State was permitted to prove that a few minutes after the deceased, Mathis, was attacked and shot, and at the same locality, Bates and the two Harveys were assaulted by two persons; that the elder Harvey was shot by said two persons and severely but not mortally wounded; that one of said two persons making said assault was the defendant Ed. Powell, and that the other one resembled the defendant Leeper; that said assault was made by said two persons for the purpose of robbing the persons assaulted. Defendants reserved a bill of exceptions to the admission of this testimony, from which it appears that the learned trial judge admitted it upon the ground that it was *res gestæ* of the assault made upon Mathis, the deceased. We coincide with the trial judge in
109 his view of the testimony. The assaults upon Bates and the two Harveys were almost simultaneous with the previous assault made upon Mathis and were made at the same place. Robbery was manifestly the motive actuating the assailants. They had deliberately planned the robbery of the parties assaulted and had laid in wait for them at the place where the assaults had been committed. Each of the assaults was a part of the general scheme—a part of the conspiracy to rob the persons assaulted. They were so closely connected with, related to, and illustrative of each other as to make each *res gestæ* of the other. This testimony was essential to identify the parties who assaulted and shot Mathis and to show the motive and intent of such assault. It bore distinctly upon the main issue in the case and was not extraneous matter within the meaning of the rule which requires that the jury should be instructed to restrict their consideration of extraneous matter adduced in evidence to the specific purpose for which it was admitted. (McKinney *v.* State, 8 App., p. 626; Willson's Crim. Stats., § 2344.)

We hold that said testimony was admissible and that it was not required that the court should instruct the jury as to the purpose for which it was admitted and to limit their consideration of
110 it to such purpose. Furthermore, the main, if not the sole, reason of the rule which requires the court to restrict the jury in the consideration of extraneous matter admitted in evidence does not obtain in this case. Defendants were being prosecuted for the murder of Mathis by shooting him immediately before the attack was made upon Bates and the Harveys. It was conclusively proved that Mathis died within a few hours from the effect of that shooting.

None of the other parties assaulted were killed; hence the jury could not have been influenced or misled by the testimony relating to the assaults upon Bates and the Harveys to convict the defendants of those assaults. It is not clear to the mind of the writer that in such case, even if the matter admitted in evidence was extraneous, that it would be error to omit to give an instruction limiting its consideration by the jury. It would be the better practice, perhaps, in such case to give such an instruction; but it is not necessary that this question should be here determined. It is made to appear by another bill of exception that after the defendant, Ed. Powell, had been arrested and placed in jail his shirt was taken off his body by the jailer and marks or bruises were found upon his body, indi-
111 cating that he had been struck one or more blows. This testimony was objected to by the defendant upon the ground that it was compelling the defendant to testify against himself. We do not think that the bill of exception shows that any error was committed in this matter. It does not appear that the defendant was compelled to expose his body, that his shirt was removed without his consent, nor is it shown by the bill of exception what injury or prejudice might have been caused said defendant by the admission of said testimony. In the manner in which this ruling of the court is presented by the bill of exception it does not appear that any material error, if error at all, was committed. (Willson's Cr. Stat., § 2368.)

There is but one bill of exception reserved to the charge of the court, and that is that it does not instruct as to the law where a homicide is committed by a person who at the time is in a state of intoxication. We are of the opinion that such instruction was not demanded by the evidence. There is no evidence in the record that defendants were drunk at the time of the homicide. On the contrary, the evidence shows that the homicide was deliberately committed by persons who were evidently in possession of
112 their full mental powers and whose purpose — to rob, even at the expense of human life. The defendants object to the charge of the court upon circumstantial evidence. No objection was made to this part of the charge in the court below. While the last sentence of the said portion of the charge may not be correct and should have been omitted, still the error, if error it be, was not, in view of the evidence in the case and of the preceding portion of said charge, calculated to mislead the jury or in any manner to injure the rights of the defendants. If said portion of the charge had been excepted to we are not prepared to say that we would hold it to be free from error.

With respect to the absent testimony set forth in defendants' application for a continuance it is apparent, we think, in view of the evidence adduced on the trial, that said testimony was not probably true. Hence the refusal of the application for a continuance does not afford good ground for a new trial. (Willson's Crim Stats., § 2186.)

It is made a ground for a new trial in the motion that B. F. Smith, who served on the jury in the trial of the cause, was not a house-

holder in the county or a freeholder in the State. When tested upon his *voir dire* as to his qualifications to serve as a juror said Smith answered the question "Are you a householder in the
113 county or a freeholder in the State?" affirmatively, and defendants and their counsel state under oath that at the time of accepting said juror they were ignorant of his disqualification, and did not ascertain that fact until after the conclusion of the trial. We will not stop to inquire into and determine the question as to the competency of the juror for the reason that the mere disqualification of the juror is not a valid ground for a new trial. It is not a statutory ground. (C. C. P., art. 777.) In order to constitute it a good ground for new trial it must be further made to appear that probable injury has resulted to the defendant by reason of such juror having served upon the trial. (O'Mealy *v.* State, 1st App., 180; People *v.* State, 6 Crim. Law Mag., p. 334 and note.) There are some decisions of this court which hold to the contrary of the rule above stated (Armendares *v.* State, 10 Apps., 44; Boren *v.* State, 23 Apps., 28; Brackenridge *v.* State, 27 Apps., 513; Lester *v.* State, 2 Apps., 432). These decisions are not, we think, after a more thorough consideration of the question, consistent with the statute, and we therefore overrule them in so far as they hold that the mere disqualification of a trial juror is of itself good ground for a new trial, it not being shown that probable injury has been done the defendant by reason of the disqualified juror serving in the case. In this case it is not shown *that* even pretended that the juror Smith was not an impartial juror. No fact is made to appear which raises the slightest suspicion of the fairness
114 of the jury which tried the case. We hold that the court did not err in refusing the new trial because of the disqualification of said juror, even if he was disqualified.

We find the evidence amply sufficient to warrant the conviction and to justify the extreme penalty of the law. There is no error apparent of record for which the conviction should be disturbed, and it is therefore affirmed.

(Signed) SAM. A. WILLSON,
Judge C't Appeals.

Judges all present & concurring.

EXHIBIT B.

In the Court of Appeals of the State of Texas. Austin Term, 1890.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS. } No. 6936. Third Assignment.

Now come the appellants and move the court to vacate and set aside the judgment of affirmance rendered and entered herein on Saturday, the 24th day of May, A. D. 1890, and grant a rehearing of this cause for the following reasons, to wit:

First. Because the court erred in holding as sufficient in substance and sustaining the bill of indictment in this case, the said bill of

indictment, as is apparent on its face, not alleging all of the material elements of the crime of murder in the first degree or any
115 other crime, and for that reason being illegal and in contravention of the constitution of the State of Texas and of the United States, of which these appellants are now and were at the time of their trial and conviction native and *bona fide* citizens.

Second. Because the record in this case discloses many other errors fundamental in their character and prejudicial and injurious to appellants, and which for these reasons ought to have been, but were not, looked to and considered by the court in arriving at the judgment of affirmance rendered and entered herein as aforesaid.

Third. Because the court erred in ruling and holding that the action of the trial court in refusing to grant appellants a new trial on the ground that B. F. Smith, one of the jurors who tried the case of appellants, was not at the time a lawful and qualified juror was not reversible error.

Fourth. Because the court erred in ruling and holding that portion of the charge of the trial court not reversible error wherein the jury was charged and instructed as follows, to wit: "If, therefore, you can account for or explain the facts and circumstances which you find from the evidence to be true upon any reasonable theory or hypothesis consistent with the innocence of either of the defendants, then, as to such defendants, you must find a verdict of not
116 guilty;" and the court erred in ruling and holding that said portion of said charge was not, in view of the evidence in the case and of the preceding portion of said charge, calculated to mislead the jury or in any manner injure the rights of the appellants, and because the court erred in ruling and holding that it was necessary for appellants to have reserved an exception to said portion of said charge of the trial court before this court could look to and consider the same as reversible error.

Fifth. Because the court erred in ruling and holding that the action of the trial court in refusing, when requested so to do by appellants, to charge the jury on the law applicable to murder in the second degree or homicide committed by a person who is at the time in a state of intoxication, and which refusal so to charge was at the time excepted to, was not reversible error.

Sixth. Because the court erred in ruling and holding as correct and as not fundamental and reversible error that portion of the charge of the trial court in this case wherein he said to the jury, "I will therefore now give you in charge the law as applied to the facts in this case for your guidance." The language here
117 employed by the trial court was a clear assumption on his part that the evidence had established certain facts inculpatory of appellants, to which he had applied the law. This language used by the trial court in his charge to the jury was fundamental error and necessarily prejudicial and injurious to the most sacred rights of the appellants and subversive of the prerogative of the jury as the sole judges of the evidence and the sole determiners of the facts established thereby.

Seventh. Because the court erred in ruling and holding that the action of the trial court overruling appellants' motion to quash the special venire of talesmen summoned in said case, because the sheriff was not sworn and instructed as required by law, notwithstanding he was present in court at the time said venire of talesmen were by the court ordered, was not reversible error, the same having been excepted to by appellants.

Eighth. Because the court erred in affirming said judgment of conviction when the record disclosed the fact that there was an eye-witness to said homicide within the jurisdiction of the trial court who was not introduced as a witness at the trial, nor any reason assigned or explanation given why such witness was not introduced. The evidence of such eye-witness would surely have been entitled to be classed as the best evidence, and not to produce it at the trial or assign any reason—sufficient reason—for the failure to do so was calculated to and probably did prejudice and work injury to the rights of appellants; and such failure on the part of the State to introduce as a witness at said trial the son of the deceased, whom the record discloses was in company with his father at the time the latter was shot, and who was, as further disclosed by the evidence, the only living eye-witness of the homicide at the time of the trial of appellants, was unexplained, an error so glaring as to fully justify the court on its own motion and in the interest of justice in reversing said conviction.

118

Ninth. Because the court erred in ruling and holding that the action of the trial court in overruling the application of appellants for a continuance, which action was excepted to, was not reversible error.

Tenth. Because the evidence on which said conviction was based was insufficient, vague, inconsistent, uncertain, unreliable, and much of it palpably untrue, for the reason that physical facts rendered it impossible for it to be true, and the court, it is insisted with great deference, erred to the prejudice of the sacred rights of appellants in holding it conclusive of their guilt.

119

Eleventh. The court erred in holding as competent the evidence showing that bruises were found upon the appellant Powell's person when the jailer made him remove his shirt, and the court erred in holding as competent, without limitation, the evidence proving other and subsequent crimes.

Appellants state that the names of the opposing counsel in this cause are the attorney general, Vardiman, White & Taylor, and McDowell & Miller, who reside at Gatesville, Coryell county, Texas, and appellants pray that notice of this motion be served in accordance with law.

(Signed) J. E. THOMAS,
Att'y for Appellants.
G. P. M. TURNER,
Att'y for Appellants.

EXHIBIT "C."

JIM LEEPER & ED. POWELL
vs.
THE STATE. } 6936. Appeal from Coryell County.

On motion for rehearing.

A majority of the court adheres to the opinion heretofore rendered. Judge Hurt dissents from that portion of the opinion which
120 holds that the mere disqualification of the juror Smith does not constitute grounds for a new trial, and will deliver a dissenting opinion. He concurs in other views expressed in original opinion. We shall therefore confine our discussion to the question as to whether or not the disqualification of said juror, if in fact he was disqualified, entitles the defendants to a new trial.

We shall not enter upon an investigation and review of authorities, for, whatever may be the common-law rule established by the decisions of other States, we consider that in the decision of this question we must be controlled by our statute. In this State for more than thirty years we have had a Penal Code and a Code of Criminal Procedure, which, having been carefully prepared by distinguished, experienced, and able jurists, were adopted by the Legislature. These codes have been pronounced by the bench and bar of our State to be the most perfect system of criminal laws ever devised. It is declared to be the design of the Penal Code to define in plain language every offense against the laws of this State and affix to each offense its proper punishment (P. C., art. 1). It is declared that the Code of Criminal Procedure is intended to embrace the rules applicable to the prevention and
121 prosecution of offenses against the laws of this State and to make rules of procedure in respect to the prevention and punishment of offenses intelligible to the officers who are to act under them and to all persons whose rights are to be affected by them (C. C. P., art. 1).

We regard it as the imperative duty of this court and of all the other courts of this State in the trial and determination of causes to be guided and controlled by the statutes of the State whenever there is a statute applicable to the question presented. Our observation is that many errors have crept into the decisions of the courts of this State, especially in criminal cases, by following common-law rules and the decisions of other States, overlooking our own statutes. These errors should be corrected whenever detected and a strict adherence to statutes should be the rule governing courts in their decisions.

With respect to new trials in felony cases our Code of Criminal Procedure is specific, plain, and emphatic. It provides that new trials in cases of felony shall be granted for the following causes and for no other. Then follows an enumeration of the causes for which new trials shall be granted. None of the causes enumerated
122 embrace as a ground the disqualification of a trial juror.

What authority, then, has a court to grant a new trial for such cause? If such authority exists, it is certainly not conferred by any express provision of the statute, nor do we think that it — impliedly conferred. One of the statutory grounds for a new — is where a court has misdirected the jury as to the law or has committed any other material error calculated to injure the rights of the defendant (C. C. P., art. 777). Under this subdivision the error committed must be a material one calculated to injure the rights of the defendant. Is it error for a person who is not a householder or a freeholder to serve upon a jury? Not necessarily. Such person is not an illegal juror to the extent that his presence upon the jury will vitiate the verdict. Such disqualification is merely a cause for challenge. If challenged by the defendant it would be error to not sustain the challenge, but such error would not be material unless calculated to injure the rights of the defendant. In such case this court would not set aside the conviction unless it was made to appear that the defendant exhausted
123 his peremptory challenges and was compelled to accept an objectionable juror (Willson's Crim. Stats., § 2293).

In the case we are considering the juror was not challenged by the defendants. The juror having, by his answer under oath, shown that he was qualified, the court could not do otherwise than require the parties to pass upon him. Was this error? But if error, was it material error? It is not shown or pretended that the juror was not fair and impartial. It is not shown that he was corrupt—had been convicted of any felony or was under indictment for felony, or that he was insane, or had such bodily or mental defects as rendered him unfit for jury service, or that he had been guilty of any misconduct as a juror. How, then, can it be said that his being a juror in the case was calculated to injure the defendants? Does the mere fact that a juror does not have a house or does not own land in this State render it probable that he would not try an accused person fairly and impartially? True, it is the policy of the law that jurors shall be either householders in the county or freeholders in the State, but we do not believe that this policy is founded upon the supposition that the non-householders and non-freeholders in our State are morally unfit to serve as jurors. We think
124 the reason of the policy is to induce men to become permanent citizens; to identify their interests with the interests of the State; to add to the prosperity of the community in which they are by having homes and owning and cultivating lands and paying taxes thereon.

In conclusion, we will say that we rest our decision of this question upon our statute. We think the statute is not only plain, but mandatory, that a new trial in a felony case should not be granted because of the disqualification of a trial juror, although such disqualification was unknown to the defendant at the time of the trial, and although such want of knowledge was not because of any fault on the part of defendant or his counsel.

The motion for rehearing is overruled.

(Signed) SAM. A. WILLSON,
Judge Ct. of Appeals.

Hurt, J., dissents.

EXHIBIT "D."

In Court of Appeals. Austin Term, A. D. 1890.

JIM LEEPER & ED. POWELL
vs.
THE STATE OF TEXAS.

Be it remembered that upon the final adjudication of this cause and the rendering and entering the judgment of this court
125 therein defendants, through their counsel, gave notice in open court of an appeal to the Supreme Court of the United States of America and requested that the same be entered upon the minutes of this court, which action the court then and there refused; to which ruling defendants then and there, by their counsel, excepted, and now tender this their bill of exceptions and pray that the same be taken and filed as a part of the records in this case.

Allowed and ordered filed as part of the record in this cause.

(Signed) JOHN P. WHITE,
P. J. Court of Appeals of Texas.

Endorsement: No. —. Leeper & Powell *v.* The State of Texas. Application for writ of error to Supreme Court of U. S. Filed July 1, 1890. D. H. Hart, clerk. Filed July 2, '90. P. Walton, cl'k.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the foregoing pages, beginning on page 101 and here ending, contain a true and correct copy of the original petition for writ of error in cause # 6936, Jim Leeper & Ed. Powell *vs.* The State of Texas, together with exhibits marked A, B, C, & D, forming a part thereof, all of which are on file in this office.

Witness my hand and the seal of said court of appeals this the 14th day of July, A. D. 1890.

Seal Court of Appeals of Texas.

P. WALTON, *Clerk.*

126 UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable judges of the court of appeals of the State of Texas, holding sessions at Austin, in said State, Greeting:

Because in the records and proceedings, as also in the rendition of the judgment of a plea which is in said court of appeals, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said proceeding entitled Jim Leeper and Ed. Powell *versus* The State of Texas, No. 3936 on

the docket of said court of appeals, sitting at Austin, in said State, wherein was drawn in question the construction of certain clauses of the Constitution of the United States and the decision of said court was adverse to and against the right, privileges, immunities, and exemptions so specially set up and claimed under those clauses of the Constitution of the United States, and that by reason thereof manifest error hath happened, to the great damage of your petioner-, Jim Leeper and Ed. Powell, who are plaintiffs in error herein, as by their complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you. if judgment be therein given, that then, under your seal, dis-
127 tinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October next, in said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of the United States, the 1st day of July, in the year of our Lord eighteen hundred and ninety, and seal of our
[SEAL.] said circuit court, at Austin, in the one hundred and fourteenth year of the Independence of the United States.

(Signed) D. H. HART,
Clerk of the Circuit Court of the United States,
Western District of Texas, at Austin.

Allowed by—
(Signed) JOHN P. WHITE,
Presiding Judge Court of Appeals of Texas.

Endorsement: No. 3936, No. 2190. C. C. Jim Leeper and Ed. Powell *v.* The State of Texas. Original writ of error. Issued July 1st, 1890. D. H. Hart, clerk. Filed July 1, '90. P. Walton, clerk.

CLERK'S OFFICE, COURT OF APPEALS.

128 I, P. Walton, clerk of the court of appeals of Texas, at Austin, hereby certify that the above and foregoing page contains a true and correct copy of the original writ of error to the Supreme Court of the United States issued in cause No. 6936, Jim Leeper & Ed. Powell *vs.* The State of Texas.

Witness my hand and the seal of said
Seal Court of Appeals of Texas. court of appeals, at Austin, this 14th day of July, A. D. 1890.

P. WALTON, *Clerk.*

United States of America to James S. Hogg, attorney general of the State of Texas, at Austin, Greeting:

You are hereby cited and admonished to be and appear at a Su-

preme Court of the United States, to be holden at Washington on the second Monday of October next, pursuant to a writ of error filed in the clerk's office of the court of appeals of Texas, sitting at Austin, wherein Jim Leeper & Ed. Powell are plaintiffs and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected and speedy justice should not be done to the parties in that behalf.

JOHN P. WHITE,
Presiding Judge, Court of Appeals of Texas.

129 I hereby waive service of this citation and accept copy of same this 3rd day of July, A. D. 1890.

(Signed) J. S. HOGG,
Att'y General for Texas.

Endorsement: No. 6936. In Supreme Court of the United States. Jim Leeper & Ed. Powell, pl'ffs in error, *v.* The State of Texas, def't in error. Citation in error. Filed July 3, '90. P. Walton, cl'k.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the foregoing citation in error is a true and correct copy of the original, together with waiver of service and acceptance of the same and endorsement thereon.

Witness my hand and the seal of said court of appeals this the 14th day of July, A. D. 1890.

Seal Court of Appeals of Texas.

P. WALTON, *Clerk.*

Assignment of Errors.

In the Supreme Court of the United States.

JIM LEEPER & ED. POWELL, Plaintiffs in Error,
vs.
THE STATE OF TEXAS, Defendant in Error.

And now come the plaintiffs, Jim Leeper and Ed. Powell, and make the following specifications of error committed by the court of appeals of Texas in the decision of this cause:

130 First. Jim Leeper and Ed Powell, being *bona fide* citizens and residents of the State of Texas and United States of America, were put upon trial in the district court of Coryell county, State of Texas, upon a charge, by bill of indictment, for murder, said indictment having been drawn under and in accordance with an act of the Legislature of the State of Texas, passed June 26th, A. D. 1881, prescribing forms of indictment for certain offenses against the penal laws of the State of Texas and conforming with form number two, section eleven, of said legislative act. Said indictment is not in accordance with but is repugnant to the fifth amendment to the Constitution of the United States, being deficient in not containing all the essential elements to constitute murder in the first degree, and, not

in fact being an indictment charging any offence at all, the district court of Coryell county had no jurisdiction over their persons, said so-called indictment by virtue of said legislative enactment being in contravention of the Constitution of the United States and the fifth and fourteenth amendments thereof.

Second. The indictment in this cause presented under said form number two, section eleven, acts of the Legislature of the State of Texas, passed June 26th, A. D. 1881, if it charges any offense at all, charges no higher grade of offense than that of murder in the
131 second degree, the punishment for which, as prescribed by art. 609, Penal Code of the Revised Statutes of the State of Texas, is imprisonment for a term of years not less than five. In the punishment in this case Jim Leeper and Ed. Powell, plaintiffs in error, are not accorded due process of law and are not accorded the equal protection of the law with other citizens of their own State or the citizens of other States of the United States, as is guaranteed to them by the Constitution of the United States and the fourteenth amendment thereof.

Third. The sixth amendment to the Constitution of the United States provides for and guarantees to every citizen thereof charged with crime a trial by jury; that section thirteen, article five, of the constitution of the State of Texas provides for a jury of twelve men in all cases of the grade of felony; that article twenty-two of the Code of Criminal Procedure provides that no person can be convicted of a felony except upon the verdict of a jury, and that article 636, same code of the State of Texas, sets forth fourteen causes for challenge; that in this cause there were only eleven qualified jurors who sat in the trial of the cause, one of the twelve not pos-
132 sessing the requisites necessary to constitute him a legal juror under said article 636, and the construction put upon that article 636 by the court of appeals of the State of Texas is a forced and unnatural one in holding that the mere disqualification of a juror does not vitiate a verdict rendered thereby, and is in contravention of the right guaranteed by the Constitution of the United States, and deprives plaintiffs in error of their lives without due process of law, and is in contravention of the fourteenth amendment of the Constitution of the United States.

Fourth. The fifth amendment to the Constitution provides that no person accused of crime shall be compelled to testify against himself. The inspection of the person of one confined in jail and then the result of such inspection given in evidence upon the trial is but an indirect way to compel an act which said clause is designed to prohibit, and is in contravention thereof and is not due process of law, and is repugnant to and in contravention of the fourteenth amendment of the Constitution of the United States.

Fifth. The right of appeal is an inherent right, as old as jurisprudence itself, and is guaranteed by subdivision first, section
133 second, article third, Constitution of the United States, and a denial thereof by the court of appeals of the State of Texas was a denial to these plaintiffs in error, Jim Leeper and Ed. Powell,

of the rights guaranteed to them by the Constitution of the United States and the fourteenth amendment thereof.

Wherefore, by reason of the foregoing errors, this cause should be reversed and dismissed.

J. E. THOMAS,
Attorney for Plaintiffs in Error, Jim Leeper and Ed. Powell.

Endorsement: No. 6936, 3. Jim Leeper & Ed. Powell *vs.* The State of Texas. Assignment of errors. Filed July 3, '90. P. Walton, clerk.

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the above and foregoing, beginning on page 129 and here ending, is a true and correct copy of the original assignment of errors in cause No. 6936, Jim Leeper & Ed. Powell *vs.* The State of Texas, filed in this court on the 3rd day of July, A. D. 1890.

Witness my hand and the seal of said court of appeals this the 14th day of July, A. D. 1890.

Seal Court of Appeals of Texas.

P. WALTON, *Clerk.*

134 *General Certificate.*

CLERK'S OFFICE, COURT OF APPEALS.

I, P. Walton, clerk of the court of appeals of Texas, at Austin, do hereby certify that the foregoing 133 pages contain a true and correct copy of all the proceedings had in cause No. 6936, Jim Leeper & Ed. Powell *vs.* The State of Texas, both in this court and the lower court, as the same appears from the records and papers pertaining to said cause on file in this office.

Witness my hand and the seal of said court of appeals, at Austin, this 14th day of July, A. D. 1890.

Seal Court of Appeals of Texas.

P. WALTON, *Clerk.*

Endorsed on cover: Supreme Court of the United States. Jim Leeper & Ed. Powell, pl'ffs in error, *vs.* The State of Texas, def't in error. In error to the court of appeals of Texas.

Endorsed on cover: Texas court of appeals. No. 1239. Jim Leeper and Ed. Powell, plaintiffs in error, *vs.* The State of Texas. Filed August 18, 1890.

IN THE

Supreme Court of the United States

Jo Loperia and
Ed Powell,
Plaintiffs in Error,

vs. No. 1239

The State of Texas,
Defendant in Error.

Brief prepared by J. E. Thomas and G. P. M. Turner, attorneys of record for appellants in the Texas Court of Appeals, submitted to the Supreme Court of the United States in the case at bar, by

G. P. M. TURNER,
Of Counsel for Plaintiffs in Error.

of the rights guaranteed to them by the [illegible] of the United States and the [illegible] amendments [illegible]

Wherefore, by reason of the [illegible] this cause should be reversed and dismissed.

J. E. THOMAS.

[illegible]

Endorsed on cover: No. [illegible] Jim Leeper et al. Plaintiffs in error, vs. The State of Texas. Assignment of errors. Filed [illegible], 1880. [illegible] Walton, clerk.

[illegible]

I, P. Walton, [illegible] hereby certify that the [illegible] and [illegible] and [illegible] Jim Leeper et al. [illegible] State of Texas filed in this court on the [illegible]

Witness my hand [illegible] Seal Court of Appeals [illegible] of Texas. A. D. 1880.

P. WALTON, [illegible]

131 [illegible]

[illegible]

I, P. Walton, clerk of the court of appeals [illegible] hereby certify that the foregoing [illegible] correct copy of all the proceedings [illegible] Leeper & Ed. Powell vs. The State of Texas, [illegible] the lower court, as the same appears [illegible] pertaining to said cause on file in this office.

Witness my hand and the seal of [illegible] Seal Court of Appeals [illegible] of Texas. July A. D. 1880.

P. WALTON, [illegible]

Endorsed on cover: Supreme Court of the United States. Jim Leeper & Ed. Powell, pffs in error, vs. The State of Texas, def'd in error. In error to the court of appeals of Texas.

Endorsed on cover: Texas court of appeals. No. [illegible] Jim Leeper and Ed. Powell, plaintiffs in error, vs. The State of Texas. Filed August 18, 1880.

Office Supreme Court U. S.
FILED.
DEC 1 1890
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

JIM LEEPER and
ED. POWELL,
Plaintiffs in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.

No. 1239.

Brief prepared by J. E. Thomas and G. P. M. Turner, attorneys of record for appellants in the Texas Court of Appeals. Submitted to the Supreme Court of the United States in the case at bar, by

G. P. M. TURNER,
Of Counsel for Plaintiffs in Error.



IN THE

Supreme Court of the United States.

JIM LEEPER and
ED. POWELL,
Plaintiffs in Error,
vs.
THE STATE OF TEXAS,
Defendant in Error.

No. 1239.

STATEMENT OF THE CASE.

The plaintiffs in error were convicted in the District Court of Coryell County, Texas, at the January term, 1890, of murder in the *first* degree with the death penalty. A motion for a new trial was made and the reasons therefor were assigned, all which fully appears in the record, page 45. The motion for a new trial was overruled and an appeal was prayed and granted to the Court of Appeals of Texas, that being the Court of last resort in that State. The case was heard by the Texas Court of Appeals on the record from the lower court, and the conviction was affirmed, all the Judges of the Court of Appeals being present and concurring. A motion for rehearing was filed in the Court of Appeals and the reasons therefor were fully set forth, as appears in the record, page 69. The motion for rehearing was heard by the Court of Appeals, and a majority of the judges adhered to the original judgment of affirmance

see the record, page 75. Judge Hurt, one of the judges dissented and filed a dissenting opinion; see record, page 80. The appellants upon the final adjudication of the case by the Texas Court of Appeals, the same being the court of last resort in that State, and after the rendering and entering of the judgment therein, gave notice in open court of an appeal to the Supreme Court of the United States, and asked that the same be entered upon the minutes of said Texas Court of Appeals; which action the Court of Appeals refused, to which ruling the appellants then and there excepted and tendered their bill of exceptions and asked that the same be allowed and made part of the record. This was so allowed and ordered by the presiding judge of said court; see record, page 100. The appellants then presented to the presiding judge of the Texas Court of Appeals their petition for writ of error, fully setting forth therein the reasons for the same; see record, pages 101 to 108 inclusive; and the prayer of said petition was granted by the presiding judge of said Texas Court of Appeals; see record, page 108. Writ of error was issued by the clerk of the Circuit Court of the United States for the Western District of Texas, at Austin and the same being presented was allowed by the presiding judge of the Court of Appeals of Texas; see record, page 127. Citation to answer said writ of error, was issued by the presiding judge of the Court of Appeals of Texas, directed to the Attorney General of Texas, who accepted service; see record, page 129. Plaintiffs in error made assignment of errors in the Supreme Court of the United States; see record, page 129 (60).

It is submitted that the record in this case does show that "a final judgment * * * * in the

highest court of Texas in which a decision could be had," was pronounced, and that in the record adjudicated there was "drawn in question the validity of a statute of, or an authority exercised under the State" of Texas, "on the ground of their being repugnant to the Constitntion of the United States," and "their decision was in favor of the validity of such statute or authority exercised under the state," in this that the statute of the State of Texas authorizing an indictment for murder in the first degree, by the use of the language in the indictment against plaintiffs in error, and on which they were convicted, is absolutely repugnant to the Constitution of the United States, in that it does away with the necessity of informing the accused of the "*nature and cause*" of the accusation, and so does away with the common law rules, for charging the crime of murder in the first degree, which no state legislature has the right to do. To aver a felonious killing is to charge manslaughter, not murder; to aver a felonious killing of "malice aforethought" is to charge murder in the second degree, not in the first degree; and to aver such killing of "deliberately premeditated" malice-aforethought is to charge murder in the first degree, and nothing short will suffice. The proposition that the indictment for murder in the first degree need not charge the aggravating facts which subject the offender to death instead of imprisonment is a monstrosity in criminal jurisprudence, and the *legislature* might just as well authorize the courts to take away the life of a man with no charge whatever against him, as with a charge which omits the part whereon the higher penalty of death rests; see Bishop on Criminal Procedure Vol. 1, Sec. 98 to 105 inclusive; and in the action of the court holding the in-

dictment on which plaintiffs in error were convicted with the death penalty, to be valid as charging murder in the first degree, was to give effect to a state statute which in its terms is repugnant to the Constitution of the United States, and is flagrantly violative of the privileges and immunities of the plaintiffs in error under the Constitution both of the State of Texas, and of the United States. The indictment against these plaintiffs in error sets out only the elements which constitute murder in the second degree, and their conviction on that indictment for murder in the first degree was a perversion of the most fundamental and sacred rules of interpretation. Bishop Criminal Procedure Vol. 2, Secs. 561 to 595 inclusive, and note 2; 58th Maine Rep. 564; 54th Maine, Rep. 408.

The Constitution of the United States is, within its sphere, to use its own term, "supreme," Cons. U. S. Art. 6. While it remains unaltered, it is subject to no power above it, for there is none. It binds the people who made it, equally with all else within its jurisdiction. 18 Howard, U. S. 331-347, 2 Dall. 304-308. All laws in whatever form or from whatever source proceeding, contrary to it, *are void.* 3d Dall. 386-399; 4 Wheat. 518-625,; 7th Pet. 469; 4th Pet. 410; 8th Wheat. 1.

CONSTITUTIONAL QUESTIONS.

It is submitted that on the trials of this cause, both in the District Court of Coryell County, and in the Texas Court of Appeals, there was "drawn in question the validity of the statute of Texas," whereby it is provided that the words * * * "did with malice aforethought kill and murder," are sufficient within themselves to constitute the charge of murder in the first

degree; that there was also "drawn in question the validity of the statute of Texas," whereby it is provided that a verdict returned by an incompetent jury (empaneled without fault on the part of defendant) will not be set aside unless it shall be made satisfactorily to appear to the court that the defendant has been *actually injured* by the presence, on the jury, of the incompetent juror or jurors. It will not be seriously contended that this latter statute is not grossly repugnant to the Constitution of the United States in that it contravenes or abridges the defendants' Constitutional guarantee of a fair and impartial trial by a jury of *twelve* good and *lawful* men; and, in support of this proposition, the dissenting opinion of Judge Hurt, of the Texas Court of Appeals, rendered and contained in the record of this case on page 39, is referred to and incorporated into and made a part of this brief. In all seriousness Judge Hurt's dissenting opinion is decisive of this case. He is one of the ablest of the many able lawyers of Texas; he is a fearless and incorruptible judge, and, like the true man of honor and generous impulses that he is, he *dared* to retrace his judicial steps when he became convinced that he had been traveling the wrong road. The reasoning of Judge Hurt, and the authorities he cites will surely convince the most sceptical, that the refusal to grant these plaintiffs in error a new trial for the reason that, without their fault, one of the jurors was incompetent, and the verdict was not the concurrent finding of a fair and impartial jury of twelve good and lawful men, was in its result the depriving of plaintiffs in error of a most sacred privilege guaranteed by the Constitution of the United States. The state statute upon which the Court of Appeals of

Texas, sustained such ruling, is a palpable attempt to contravene the Constitution of the United States. Can such as this be called law? Let the Judicial mind answer.

THE STATUTES RELIED UPON.

R. S. U. S., page 133.

Sec. 709. "A final judgment or decree in any suit in the highest court of a state in which a decision in the suit could be had, where is drawn in question the validity * * * * of a statute of, or an authority exercised under any state, on the ground of their being repugnant to the Constitution * * * of the United States, and the decision is in favor of their validity; or where any * * * right, privilege or immunity is claimed under the Constitution of the United States, and the decision is against the right, privilege or immunity specially set up or claimed by either party under such Constitution, may be re-examined, reversed or affirmed, in the Supreme Court of the United States upon a writ of error. The writ of error shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States, and the proceedings upon the reversal shall be the same, except that the Supreme Court may, at their discretion proceed to a final decision of the case, and award execution or remand the same to the court from which it was removed."

Sec. 997. There shall be annexed to and returned with any writ of error for the removal of a cause, at the day and place therein mentioned, an authenticated transcript of the record, an assignment of errors, and a prayer for reversal with a citation to the adverse party.

Sec. 999. When the writ of error is issued by the Supreme Court to a state court the citation shall be signed by the chief justice of the state court rendering the judgment * * or by a justice of the Supreme Court of the United States, and the adverse party shall have at least 30 days notice.

COMMENT.

It will be seen by reference to the foregoing statutes, that a writ of error from the Supreme Court of the United States, to a state court, has been fully provided for, we have now only to determine what effect such writ of error shall have, and to what extent the judgment of the state court, complained of, may be re-examined and re-adjudicated, so to speak.

R. S. U. S., page 187.

Sec. 1003. Writs of error from the Supreme Court of the United States, to a state court in cases authorized by law, shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

U. S. Statutes at Large, book 25, page 656, chap. 113, provides for the issuance of writs of error from the Supreme Court of the United States, to inferior federal courts. This statute regulates the manner of issuing the writ of error in such cases, and defines its status and effect, and, as we have seen, writs of error from the Supreme Court of the United States to State Courts shall be issued in the same manner, and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States.

Chap. 113. U. S. Statutes at Large, book 25, page 656 is as follows: Sec. * * Sec. * *

Sec. 6. That hereafter in all cases of conviction of crime, the punishment of which, provided by law, is death, tried before any court of the United States, the final judgment of such court shall, upon the application of the respondent be re-examined, reversed or affirmed by the Supreme Court of the United States upon a writ of error under such rules and regulations as such court may prescribe. Every such writ of error shall be allowed as of right, and without the requirement of any security for the prosecution of the same, or for costs. Upon the allowance of every such writ of error, it shall be the duty of the clerk of the court to which the writ of error shall be directed to forthwith transmit to the clerk of the Supreme Court of the United States, a certified transcript of the record in such case, and it shall be the duty of the clerk of the Supreme Court of the United States to receive, file and docket the same. Every such writ of error shall, during its pendency operate as a stay of proceedings upon the judgment in respect of which it is sued out. Any such writ of error may be filed and docketed in said Supreme Court at any time in a term held prior to the term named in the citation, as well as at the term so named; and all such writs of error shall be advanced to a speedy hearing on motion of either party. When any such judgment shall be either reversed or affirmed, the cause shall be remanded to the court from whence it came for further proceedings in accordance with the decision of the Supreme Court; and the court to which such cause is so remanded shall have power to cause such judgment of the Supreme Court to be carried into execution.

These being the statutes regulating the issuance of writs of error, they must be interpreted together. One statute provides for writs of error from the Supreme Court of the United States to State Courts, R. S. Sec. 709. Another statute provides for writs of error from the Supreme Court of the United States to inferior federal courts, Stats. at Large, book 25, Chap. 113, Sec. 6. Another statute declares that the writ of error from the Supreme Court of the United States to a state court, "shall be issued in the same manner and under the same regulations, and shall have the same effect as if the judgment or decree complained of had been rendered or passed in a court of the United States." This being true, it goes without the saying that the record in the one case shall be considered and passed upon, to the same extent that is required in the other case. The writs of error provided for in each of the statutes referred to, shall have the "same effect." The "effect" of a writ of error from the Supreme Court of the United States to an inferior federal court, is to require an adjudication of all legal questions involved in the record. The "effect" of a writ of error from the Supreme Court of the United States, to a state court, is the same, unless Sec. 1003, R. S. means nothing.

If on a review of the record in the case at bar it shall appear that the Texas Court of Appeals has given effect to state statutes, by which, in violation of the Constitution of the United States, the *guaranteed* rights, privileges and immunities of plaintiffs in error have been abrogated contravened or in any other way whatever withheld from them, it is not only the right, but the duty of this honorable Court to interpose its protesting mandate. In all sincerity it is insisted that both in the trial court

below, and in the Texas Court of Appeals, state statutes were given effect, the provisions of which most flagrantly attempt to defy the Constitution of the United States, and through the instrumentality of these identical statutes these plaintiffs in error have been convicted and condemned to death. Tried upon an indictment which charges only murder in the second degree, which involves imprisonment only as the punishment, they have been convicted of the uncharged crime of murder in the first degree, and their punishment fixed at hanging by the neck until they are dead. The law of the land that binds the State of Texas as well as the other states, declares that no such thing can be done in America, and yet such will be done unless some power having authority to enforce the *genuine* law of the land, can be brought into requisition. In what direction shall we look for that power? The power to act, the power to insure to these plaintiffs in error the protection vouchedsafe to them by the fourteenth amendment to the Constitution of the United States, is to be found alone in the Supreme Court of the United States, and to that court these plaintiffs in error appeal earnestly and humbly for justice according to the law.

The Constitution of the United States, without reserve, or limitation, guarantees to plaintiffs in error a fair and impartial trial by a jury composed of twelve good and lawful men. These plaintiffs in error were tried and convicted by a jury of eleven good and lawful men, and one unlawful or incompetent man. This incompetent man became a member of the jury by swearing falsely on his *voir dire* that he possessed the requisite qualifications for a juror as prescribed by statute. A state statute, and a state authority of Texas

declared that the verdict of that absolutely unlawful jury should not be disturbed unless the defendant could make it appear to the satisfaction of the court that he had suffered actual injury by the presence on the jury of the incompetent man. What a travesty upon the constitutional privileges of plaintiffs in error. Has not the Texas court given effect to a statute that has been used to deprive plaintiffs in error of their sacred constitutional rights? Has not the fourteenth amendment to the Constitution of the United States been violated, and, thereby have not plaintiffs in error, been denied a fair and impartial trial by a *jury* of good and lawful men? Have they not been condemned to death without due process of law? Shall the Supreme Court of the United States, refuse to give effect to the genuine law of the land, the organic guarantees. Shall the fourteenth amendment be rendered nugatory? Shall the citizen perish in the flood, with a life boat at hand? Shall the things which are Cæsars not be rendered unto Cæsar? Shall the lives and liberties of Americans not be protected, according to the law of the land? Let this honorable Court answer.

These men, the plaintiffs in error, have been unlawfully condemned to die. They ask for life only as the spirit of the genuine law of the land gives it to them. Shall they live, or must they die?

G. P. M. TURNER,
Attorney for Plaintiffs in Error.

Office Supreme Court U. S.
FILED,
NOV 25 1890
JAMES H. McKENNEY

IN THE

Supreme Court of the United States.

JIM LEEPER and ED. POWELL, Plaintiffs in error
against
THE STATE OF TEXAS, Defendant in error.

No. 1239.

WILLIAM S. FLIPPIN.
Attorney for Appellants.

IN THE

Supreme Court of the United States.

JIM LEEPER and ED. POWELL, Plaintiffs in error
against
THE STATE OF TEXAS, Defendant in error.

No. 1239.

The case before the Court is this: The plaintiffs in error were convicted in the District Court of Coryell County, Texas, for the murder of one Mathis, (just after dark) on the night of December 17, 1889, which conviction was had upon circumstantial evidence alone. The indictment, trial and conviction all took place at the January term of said court, 1890.

The appellants had caused subpœnas to issue for Mrs. M. E. Buster, Thomas Buster, Sherman Hoover, John Jolly and Bud Campbell, as witnesses in their behalf—Of these Mrs. Buster, as well as Thomas Buster and Sherman Hoover resided in Coryell County; upon the two first named service was had January 23, 1890, but they did not appear at the trial. The return showed that Sherman Hoover was "not found." John Jolly resided in Coleman County; Bud Campbell in Dickens County. In order to have the attendance of the two last named attachments were, at the instance of the defendants in the court below, issued to the sheriffs of Coleman and Crosby Counties, as Dickens was unorganized and attached to Crosby County for the purposes of administration of justice. Campbell was not found by

the sheriff; hence was not attached. It appears that none of the witnesses could be found, except those herein named. The appellants therefore moved the court upon proper affidavit (which is set out in the record) for a continuance of the cause, stating that by Mrs. Buster they expected to be able to prove that they came to her house, a distance of ten or twelve miles north of Gatesville some time near the hour of nine o'clock on the night of the murder and remained there during the night, which was, in fact, some twenty miles from the place where the murder was committed; that by Thomas Buster they expected to prove that they did not carry pistols on the day of the murder, but that on the morning of the day on which the killing was done they left them behind when going out, and in the house of the said Buster; that by John Jolly they expected to prove that he had met them on the evening of the murder about one mile north of Gatesville; and had accompanied them as far as the four mile spring north of Gatesville; that he went on and left defendants there; that it was just dark when he first met with them; that Powell, as they were going along got his ear hurt by the rebound of a branch or limb of a tree, and not as supposed and stated by the witness Harvey; which was that at or near the same place at which Mathis was shot, he was attacked by two men; a tall one and a short one; one of whom he claims to identify as Powell—and whom, he said, in the altercation he had struck on certain parts of his body —viz: head, back and shoulder.

These blows were not given by Mathis—the dead man—for whose murder appellants were convicted, but by an entirely different person. And if it were a fact that two other different men attacked and killed Mathis,

who somewhat resembled the prisoners and appellants then we have them unjustly convicted upon this sort of worthless evidence (at any rate very weak in kind) and wholly circumstantial. Beside this there is really no proof against appellants, except the dying declarations of Mathis—that two men assaulted nim, "one of whom was considerably taller than the other."

By Sherman Hoover they expected to prove, as set out in the affidavit, that he found the defendants and John Jolly between the town of Gatesville and the Four Mile spring, about seven or seven and one half p. m. on the night of the murder. The affidavit, page 17 of the record, discloses the fact that these witnesses were not absent from the Court by procurement or consent of the appellants; that the application was not made for delay; that there was no reasonable expectation of securing the attendance of all of said witnesses during that term of said Court, etc., etc.

Tnese were indeed material facts, but the Court overruled the motion for continuance and the trial proceeded.

Being convicted a motion was made by appellants for a new trial, and that being refused, they bring their case here on a writ of error sued out to the Court of Appeals of the State of Texas, and assign with other matters already assigned in the record, as error what follows:

The principle "due course of law" as used in the Constitution of the United States was clearly violated in the proceedings which led to the conviction of the appellants. It is maintained that there was no legal jury which sat upon this case and convicted the parties now before us; one of the jurors having sworn on his *voir dire* that he was competent, but after verdict it

was discovered to be false. Moreover, another constitutional provision was violated in this; that one of the defendants, Powell, was subjected to the indignity of having his shirt taken off by the jailer that he might expose to him and others a bruise or wound upon his person, the object and intent of which was to corroborate something that was stated by one of the state's witnesses (Harvey), who testified that he received blows from him prior to the killing of Mathis. This was clearly in violation of that regular and orderly unfolding of the evidence which is required by the Constitution, and which states that no man shall be compelled in a criminal accusation to be a witness against himself. I here refer to the record which states the facts fully upon that point, and will add that this plan of searching or examining the person, and compelling a party to make of himself a witness against himself falls within the first named head—a trial "without due process of law," and is a violation of the 4th and 6th amendments of the Constitution of the United States.

What is "due process of law?" The Constitution of the United States, Article 3, Section 2, Sub-section 3 provides: "The trial of all crimes, except in cases of impeachment, shall be by jury;" and by amendment afterwards passed it further provides: "No person shall be held to answer for a capital, or other infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in active service in time of war or public danger; (nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb); nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of

life, liberty, or property, without due process of law; (nor shall private property be taken . . .). Further, Article 6 of the Constitution of the United States as amended provides that: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury of the State and District wherein the crime shall have been committed. . . . . And to be informed of the nature and cause of the accusation . . . ; to have compulsory process for obtaining witnesses in his favor. . . ." It will thus be seen that being compelled to be a witness against himself was clearly a violation of rights guaranteed to him by the Constitution of this country. Being compelled to undergo a naked bodily examination, out of which some testimony might be made, was as direct a violation of his constitutional rights as if he had been compelled to state facts which would prejudice his cause. And it is further insisted in this case that another constitutional right was violated, which will be found fully stated in the assignment of errors, viz: that not being able to procure witnesses to be present at the trial, and for which proper legal steps had been resorted to, that is process of subpœna, appellants were compelled to go to trial without having such witnesses by whom, according to their affidavit duly made in court they expected to be able to prove an *alibi*. One or more of these witnesses lived in other counties, and from the return of the writs it is clearly inferrable—if not a positive fact, that no sufficient time was left them prior to the meeting of the court or afterwards to procure attachments, which is the "compulsory process," and which when required is given to defendants by the Constitution itself.

"Due process of law" was violated in various other particulars as set out in the assignment of errors.

1st. The Penal Code and Code of Criminal Procedure of Texas, which appear in the acts of the 16th Legislature of Texas at its regular session, contain matter not enacted at said legislature; and said code which purports to have been passed by said legislature on the 21st of February, 1879, is not the bill passed or attempted to be passed at said point of time by said legislature, but is widely at variance and unlike the alleged bill of which it purports to be a copy and which bill is now on file in the office of the Secretary of State.

2d. It is insisted that Senate bill number 20, which purports to be the one embodying the penal code and code of criminal procedure of Texas, was not referred to the House of Representatives as is required by the Constitution of the State of Texas—section 37, article 2. This provides that "no bill shall be considered unless it has been first referred to a committee and reported thereon"—which means, as a matter of course in each House.

3d. It is further insisted that said Senate bill No. 20, was not read on *three several days* "in either House of said legislature," which was requisite to give validity to its enactment. Section 32, article 3, provides: "No bill shall have the force of law until it has been read on three several days in each House, and free discussion allowed thereon." It does provide that in cases of "imperative public necessity (and this necessity shall be stated in a preamble or body of the bill) four-fifths of the House in which the bill may be pending, may suspend this rule; the yeas and nays being taken on the question of suspension, and entered upon the journal," which provision of the Constitution was directly

violated by reason of the fact that the legislature failed to carry it out.

4th. And we insist that another and most important provision of said Constitution was likewise violated, which in the Constitution reads as follows: "No law passed by the legislature, except the general appropriation act, shall take effect or go into force until ninety days after the adjournment after which it was enacted, unless in case of an emergency, (which emergency must be expressed in a preamble or in the body of the act), the legislature shall, by a vote of two-thirds of all the members elected to each House otherwise direct; said vote to be taken by the yeas any nays and entered upon the journal."

5th. Another Constitutional provision was violated and that was this—that the legislature instead of requiring said bill to be read on three several days, came to the conclusion that this positive requirment could be obviated, if, by unanimous consent, the caption of the acts alone should be read, and not the bill in full; paragraph by paragraph. It was in this mode that the bill was passed; that is to say by reading alone the caption of the act on three several days and not the bill in full.

6th. There was no *emergency* which required that the bill should go into effect before the ninety days from adjournment of the legislature. It is however claimed that it did go into effect within three days after its passage—and as we understand it criminals were tried before said ninety days time allowed by law.

7th. It is further insisted that the preamble, found at the head of said alleged bill, after the enacting clause in the Revised Statutes of Texas, was not embodied in the bill which it is alleged was passed on the 21st of February, 1879, and which is the date of the alleged

adoption of said act as contemplated by the Constitution of Texas, but was embodied in said act by reason of a supposed authority, which was attempted to be delegated to a certain codifier by the name of John N. Lyle, and was inserted in said bill subsequent to the 21st day of February, 1879.

8th. It is further insisted that the language of the Constitution of Texas with reference to the consideration of bills on three several days is to be understood as meaning that the bill shall be read in *full* on three several days, etc.. and this is what is required by the Constitution of the State of Texas; and as said bill was not read at all at any time, except so far as the caption is concerned, there is here found a direct and palpable violation of the constitutional provision, which it is apparent would lead to much disorder and uncertain and unsafe legislation, if permitted to have any force.

9th. The Constitution of Texas was further violated in this; Said 16th Legislature (during the session of which it is pretended said Senate bill 20 was passed) did not keep a journal of its proceedings as required; and there is no authentic record of the passage of said bill or of the amendments, or of any act or thing done relative thereto during its passage through the said legislature; all of which is in open defiance and neglect of the provisions and requirments of said Constitution. Parties are entitled to this authentic and indisputable record of the proceedings of said legislature, relative to the passage of any bill. But it is distinctly averred in the assignment of errors, that if journals, such as is contemplated by the Constitution of Texas, had been duly kept, this fact would have been made evident, viz: that the Senate and House of Representatives of the State of Texas, did not upon the 21st day of July, 1879, the

day of the alleged passage of Senate bill No. 20, or upon any other day come to an agreement and understanding, or unite in one common identical legislative act on said alleged final adoption of said Senate bill No. 20, wherefore and in default of which Senate bill No. 20, wholly failed to become enacted as a law, and is absolutely null, void and of no authority in law.

10th. Another requirement of the Constitution of Texas was violated in the pretended passage of Senate bill No. 20, because it was not enrolled as and pursuant to the Joint rule No. 9 of said legislature, to-wit: "After a bill shall have passed both houses it shall be duly enrolled on paper by the enrolling clerk of the House of Representatives or Senate, as the bill may have originated in one or the other house; and properly signed by the presiding officer of each house, as required by the Constitution, before it shall be presented to the Governor." This was not done after said pretended bill was passed, and the failure to do this rendered said bill null and void. The provisions of said Joint rule were wholly disregarded, and instead of said bill being passed on the 21st day of February the following resolution was adopted by both houses of said legislature in lieu of following the requirements of said Joint rule No. 9; that is to say: "Whereas it will incur an unnecessary enormous outlay of both time and money to have enrolled the civil and criminal codes passed by this legislature, as required by Joint rule No. 9. "Therefore be it resolved, the Senate concurring, that said joint rule be suspended so far as relates to said code and that an enrollment of the amendments made thereto, properly arranged, shall be considered a proper and sufficient enrollment of said code." And this was the course pursued by said legislature instead of following the requirements of said

Joint rule No. 9; and because such course was not pursued the action of the legislature in that regard was not only questionable, but it is insisted was illegal, improper and nugatory.

11th. Again, the amendments to said bill were not only not enrolled, but said resolution was not signed by the Speaker of the House of Representatives nor by the presiding officer of the Senate, nor was said resolution approved by the Governor of the State of Texas; which was out of conformity to the constitutional provisions of said State relative to resolutions, orders or votes as required by section 13, article 4 of the Constitution, as follows: "Every order, resolution, or vote to which the concurrence of both houses of the legislature may be necessary, except on questions of adjournment, shall be presented to the Governor, and before it shall take effect shall be approved by him, or, being disapproved, shall be repassed by both houses; and all rules, provisions, or limitations shall apply thereto, as prescribed in the last preceding section in case of a "bill."

12th. It is insisted that the attempted partial abrogation of Joint rule No. 9 wholly failed, and there is no enrollment of said Senate bill No. 20, or any substitute therefor, nor is there in existence any mode of ascertaining the verity of facts further on in relation to said Senate bill No. 20. It is a fact, as alleged in the assignment of errors, that said Senate bill No. 20 is not identical with the Penal Code and Code of Criminal Procedure as the same is now current and accepted in said State of Texas, and under and by virtue of which the appellants in this case were indicted, tried and convicted. Appellants insist that there are material differences between said Senate bill and the Penal Code and Code of Criminal Procedure as found in the Revised Statutes of the State of Texas.

13th. Appellants further say that said Senate bill No. 20, alleged to have been passed by the 16th Legislature of the State of Texas, was not presented to the Governor in the shape in which it is alleged to have been passed—that is to say; certain written amendments were attached to said printed code so introduced into the Senate, which said amendments were not enrolled in the bill as presented to the Governor for his approval, but which together with other and later amendments were left by said legislature to be inserted by said John N. Lyle, codifier etc., which said insertions and codification made by said Lyle were incorrectly done after said alleged bill had been presented and considered by the Governor of Texas, and which said insertions, amendments and alterations made by said John N. Lyle could have no legal effect or force for the reason that said bill with his alterations, changes, omissions and amendments was not submitted to the said legislature for adoption or ratification; by reason of which all such amendments, insertions, alterations and changes were wholly nugatory for the plain reason that as the people had delegated to the legislature, as its agent, to make laws that could in no way delegate its power to another sub-agent or sub-delegate unless upon the report of such sub-agent or sub-delegate (if such an expression may be properly used at all) it so ratified the changes and alterations etc. made by said Lyle etc. by some positive act so as to make his act the act of the legislature of the State—which was not done; and therefore all such changes, alterations amendments etc. made by said Lyle were worthless; and notwithstanding he was regularly appointed by the Governor of Texas to codify, digest, repeal and amend said bill pursuant to an act passed on the 26th of April

1879. This last act is an act made to provide for the printing, binding and distribution of the Revised Civil Statutes, Penal Code and Code of Criminal Procedure adopted, or pretended to be adopted by the 16th Legislature of the State of Texas. Said act is to be found in the general laws of Texas for that session, chapter 151.

14th. It is a further fact that the second section of said act for the appointment of a codifier was inserted in said act long after the introduction of said bill providing for the printing, binding, and distribution of the codes, and as an amendment to said act on April 19, 1879 (Senate Journal, p. 970); that the original purpose of said bill was thus changed; that the appropriation for printing, binding, and distribution of the laws of the State was thus diverted; and another, a second, and a different subject was introduced into said bill from that expressed in the title of the act, which was in direct violation of the provisions in the State Constitution, section 35, article 3, and section 7 in article 8. Further, appellants allege that at an extra session of said legislature, running from June 10 to July 9, 1879, said legislature on the 5th day of July of said year amended said act herinbefore referred to to the effect that said codifier should insert the acts of the special session, and which fact fully appears from chapter 20 of the acts of the said special session.

15th. John N. Lyle, pursuant to said enactments, was appointed by the Governor of Texas to codify and digest, repeal and amend said bill; and the said codifier pursuant to the provisions of said acts above named in many and varied instances proceeded to codify, amend, repeal, and strike out statutes, and to exercise both legislative and judicial functions; all of which will more fully appear by reference to the Revised

Statutes of Texas, and the work of the codifier which appears therein.

16th. Appellants further allege that the proclamation of the Governor of Texas, which convened said legislature in special session, made no reference to said codes as a subject of contemplated legislation; nor did the message of the Governor to the legislature bring before that body said codes or a codifier as fit or necessary subjects for any action by said legislature in special session so convened; by reason of a failure of such action on the part of said Governor, such legislature appointing a codifier or authorizing or tending to authorize a codification of the laws of said State, or the calling of said extra session for such purpose was illegal, unconstitutional, and null and void for all purposes.

17th. Appellants further allege that the codifier, John N. Lyle, to whom was assigned the task of digesting, codifying, striking out, amending, etc., proceeded to insert and did insert amendments in said bill, to make references looking towards the modification of the laws—to strike out repealed sections and chapters; but appellants specially aver that said codifier did not confine himself to the execution of the task so attempted to be assigned to him, but altered and amended said bill beyond the limits prescribed by the said statutes in several particulars—to wit: It appears from the printed bill and amendment that the codifier was directed to insert in article 729 of the Code of Criminal Procedure the words, "The judge may not before a verdict convey to the jury his opinion of the case," which inhibition so attempted to be enacted and left to said codifier for insertion in said code, would and did tend to preclude your appellants from any benefit to be derived from instruction by the court to the effect that said code was

not legally enacted, and was of no binding or legal effect in the case at bar or in any other criminal case. The appellants allege further in a general way that said codifier inserted other amendments and omitted words in different places, so as; in fact, to put into hopeless confusion various other acts in the Revised Statutes of Texas. Reference is here made to page 62 of the Penal Code, chapter 2, relative to the forgery of land titles. The chapter as made by the codifier is wholly different from that concerning the same subject originally submitted by the five codifiers and embodied in Senate bill No. 20. This was an amendment left by the legislature to be inserted by said Lyle by virtue of his supposed authority, but appellants allege that said chapter was not inserted as intended by the legislature, and this will more fully appear by comparing the chapter in the Revised Statutes with Senate bill No. 20, on file in the office of the Secretary of State of Texas.

18th. And they further allege that Lyle, the codifier, was directed to strike out the words, "or of the Justices of the Peace, mayor or recorder in which such service was rendered," in section 1085 of the Code of Criminal Procedure as the same appears in copy of said Senate bill No. 20; but appellants allege that said words still stand in the Revised Statutes of Texas, as they were in the original bill, and are now, and have been since September 1st, 1879, accepted as the law of the State of Texas; but they aver as a fact that said legislature did not intend that said language should remain in said law. Appellants aver as a further fact, that said codifier did change the text of the said Senate bill No. 20 from what it was supposed to have been, and as it was actually passed by said legislature in this: Section 152 of the Penal Code was adopted by said legislature, and reads

as follows: "Any manager or other officer of election who shall unfold or examine any ballot, or who shall examine or permit to be examined by any other person the ballots subsequent to their being received into the ballot box, except in the manner prescribed by law, shall be punished by confinement in the penitentiary for a term not less than two or more than five years;" but appellants now allege that said Lyle in violation of his instructions and duties and in excess of his supposed authority changed said paragraph to read as follows: "Shall be punished by confinement in the penitentiary for a term of not less than one or more than two years." And they aver that said change in said penalty was made without any authority whatever given or supposed to be given to said Lyle; without a semblance or color of authority and in violation of the acts before recited relative to the appointment of a codifier. (Said act amending act of August 23, 1876, is found on page 118 of the General laws of the State of Texas, and is there numbered as CXII).

19th. And appellants further aver that section 153 of said Senate bill No. 20 was altered in the same way by the said Lyle in the elimination of the penalty inserted by the legislature and the substitution therefor of penalties enacted in said act of April 19, 1879, amending the act of 1876, and having no reference to the Revised Statutes of Texas.

20th. Appellants further aver that many other alterations similar in kind were made by said codifier, and particularly in changing the word "act" in enactments inserted in the code by the codifier into the word "article," which will fully appear by a comparison of the Revised Statutes of Texas with the certified copy of Senate bill No. 20. Reference is here made to article

104 in the Penal Code, to-wit: chapter C, which treats of the misapplication of public money, and as it stands in Senate bill No. 20, and was supposed and understood to have been adopted by the legislature was so altered by said codifier, and in the insertion of words and adaptation of articles, and figures and penalties, and the addition of a supplement as on the whole to amount to a great and dangerous variance.

21st. And appellants now aver in proof of part of which, that the legislature in special session convened, on the 2nd day of July, 1879, passed an act entitled "An act to better provide for the prompt accounting for and payment of public money by the tax collectors to the proper receiving officers." In the body of this act it was provided that "the provisions of this act shall be cumulative to the provisions of title 95, chapter 4, of the Revised Civil Statutes, concerning the collection of taxes, and of title 4, chapter 3, of the Criminal Code concerning the misapplication of public money, except where the latter may be in conflict with this act; and the provisions of said title and chapters wherein there is a conflict with this act and all other acts in conflict with this act are hereby repealed."

22nd. An emergency clause was annexed to that act, which put it into immediate operation, July 2, 1879. The codifier mutilated certain provisions and inserted only such parts of the same as met the approbation of his judgment; which he made as the supplement to chapter 3, title 4, of the Penal Code. The supplement does not contain the language of the act as adopted by the legislature.

23rd. And appellants further call attention to the fact, which is apparent on the face of the act, that the act of July 2, 1879, went into immediate effect; that

the altered supplement, being thus made a part of the Penal Code went into effect ninety days after the session had adjourned, and by some days later than the act of July 2, 1879; and that the supplement taken from the said act and inserted in the civil code went into effect at high noon, September 1, 1879; and that section 4 of said act of July 2, 1879 was thus annulled; and the result of which was that the penalty provided in that section was practically repealed if not wholly abrogated, by the operation of section 103 of the Penal Code, which, strange to say, was left by said codifier unaltered.

24th. And appellants further aver that other like instances of alterations in the text of Senate bill No. 20, (which were supposed and understood to have been enacted) occur in other articles of said Criminal Code and Code of Criminal Procedure, especially in article 173 of the Penal Code, where the codifier inserted the penalty affixed to an act entitled "An act to amend section 16 of an act regulating elections, approved August 23, 1876," and which said act did not purport to amend or refer to the Revised Statutes, and where said codifier omitted or struck out of his own motion the penalty supposed and intended to have been enacted, and which was enacted, by said Senate bill No. 20, as appears in the text of said bill.

25th. And appellants further aver that their rights, privileges and immunities as citizens of the United States have been further abridged in this particular; that the alleged Code mentioned and under the provisions of which appellants were held to trial and were convicted did not allow them and allows no defendant a challenge to the array of jurors summoned to try the cause, in case said jury is selected by jury commission, and as is required by said Code.

26th. And appellants further aver that under and by virtue of the act of 1876, (and which they aver is still the law) sheriffs are prohibited from summoning any person as a juror found within the Court House or Court yard if jurors can be found elsewhere; whereas in fact the jurors who tried these appellants were partly summoned from persons about said Court House and Court yard—and subject to influences prejudicial to appellants and while other jurors could have been easily had in the county—all of which was contrary to the Statute of 1876; that being the only law governing the selection of jurors in criminal cases in said State of Texas.

Besides the allegations of irregularities in the pretended passage of Senate bill No. 20, and which renders it null and void, as heretofore insisted, it is averred that the Constitution of the State of Texas, adopted in 1869, article 1, section 8, was likewise violated in the trial of appellants. That provision is that in all criminal prosecutions, the accused has the right to have a speedy, public trial by an impartial jury.

And they aver that all the foregoing proceedings relative to said Senate bill No. 20 (embracing the Penal Code and Code of Criminal Procedure of Texas) that transpired in the 16th session and after session of the same legislature of Texas—rendered such Code null and void; and they further say their conviction under the provisions of said Code was not according to "due process of law" in the sense of the Constitution—that their rights, privileges, and immunities as citizens of the United States were on said trial abridged; and that said Code was adopted in defiance of the constitutional guarantee of a republican form of government; and the

provision of the XIV amendment, which will be referred to further on, was also palpably violated.

It may be said that the Court have no knowledge from the record of the allegations made respecting the irregular and unconstitutional mode in which was passed the Penal Code and Code of Criminal Procedure of the State of Texas; but it is respectfully submitted that they have judicial knowledge of the facts as alleged by reason of the pleading in the case which immediately preceded this in argument—that of Dick Duncan—where a demurrer was interposed by the Attorney General, and which demurrer confesses the facts as alleged in assignment of error. They are the same in that case as in this; the verbiage in some places being slightly different.

The Court has judicial knowledge of the laws of Texas, and having already the case of Duncan before it with the facts, are in a position to make the same ruling upon such facts in appellants' case as in the other. They will certainly never in a murder case, set one man free, because the law under which he is convicted has no legal force or effect and declare that the other convicted under the same law must hang, because although his case is in the hands of the Judges at the same time as the other there was a failure to except to the sufficiency, legality and constitutionality of the law under which he was tried; and especially if this Court shall have already decided in the first case that such law or Code assigned for error possesses no validity.

And there is another assignment of error, which, in effect, explains why exceptions were not taken below to the legality and sufficiency of said above named Code. The codifier inserted in said Code these words, Section

729: "The judge may not before verdict convey to the jury his opinion of the case." This was intended to preclude (and it did in this case preclude) appellants from any benefit to be derived from instruction by the Court to the effect that said Code was not legally enacted, and was of no binding force or effect. This provision in said Code abridges the rights, privileges and immunities of all persons accused of crime and is not in accord, but totally at variance, with "due process of law."

Our clients, it would seem, are entitled, as a matter of justice, to whatever legal result may flow from the assignment of errors in Duncan's case.

The argument *ab inconvenienti* may be made in reply. Others already convicted of murder in the same State may, if our position is correct, escape the gallows temporarily; that is all. But at the moment this Court strikes dead the Penal Code and Criminal Procedure of Texas it will either awaken to newness of life the body of laws in existence prior to the adoption of the code or bring into active exercise the common law procedure in similar cases. The old law maxim—"It is better that ninety and nine guilty men escape than that one innocent man should suffer" can never find a more fitting place for its applicatiom. Nor would such action on the part of this Court prove an ineffectual warning to State Legislatures, restraining them for the future from passing acts so revolutionary in character and wanting in all characteristics of "due process of law" as the one under review.

Impartiality of Jurors Requisite.

It is impossible to conceive how the jury in this case could, with the facts before them, fulfill the condition of impartiality. What motive, it may be asked, could

impel the juror in this case, who being put upon his *voir dire* was so eager to get upon that jury as that he swore falsely to his qualification; by reason of which he through fraud practiced upon the Court and the prisoners—the appellants here entered upon the discharge of a juror. There was no waiver in this case—as, if on being presented, he had not been challenged.

But in a felony case there could not have been a waiver. And as to disqualification of juror see the very able opinion of Hunt, J. (dissenting) page 39 of record. He shows (page 16) that the prisoner was entitled to a new trial. He asks "Upon what ground?" Simply that without fault on his part he has been deprived of all legal right. Hence in law there is a real injury for which he has a legal right." See also 18 N. Y., page 128; 6 Ark. 601; 41 Mo., 470; *Hill vs. People*, 16 Mich., 351; *Brown vs. State*, 16 Ind. pp. 496; 8 Black F., 561; 17 Ark.

The books go so far as to say that a party on trial for a felony cannot consent even to be tried by a jury of eleven men. See the cases 2nd Ohio State R., 296; 3rd English, 436; 2nd Parker's Crim. Pas. 322; 2nd Lead. Cr. Cases, 327 and note; Story's Const., 3rd edition S., 1779; *People vs. Scott*, 336——Mich.; 12 Gratt., 686; ———*vs. State*, 21 Texas, 526; ———*vs. State*, 41, Texas 573; *Shumaker vs. State*, 5 Wis., 324; *Gilloy vs. State*, 58 Ind., 182-3; *Patterson vs. State*, 17 Ind., 431; Graham and Waterman on New Trials, reviewing 15 Vermont 6; See Doctrine of Waiver, Gr. and Wat. New Trials, vol. 2, page 220.

The former decisions of Texas, all prior to this case were to the effect that a new trial would be granted if a juror, not qualified, sat upon the jury. See *Armen-*

daries vs. State, 10 Apps., 44; *Boren vs. State*, 23 Apps. 28; *Brackinridge vs. State*, 27 Apps., 513.

And the Statute to which the presiding judge refers Record p. 32) Code of Criminal Procedure, Art. 777, which requires it should appear that the taking of such disqualified juror resulted in probable injury, before a new trial would be granted was a violation of the constitutional rights of the prisoners, and therefore null and void. This Code could not dispense with *probos, liberos et legales homines.*

Vir probus, liber et legalis are the words used in old books to describe the qualities demanded for a juror. It may be confidently asserted that as the law is now in this Union, and especially since the passage of the late amendments, a jury must consist, according to Constitutional requirements, of twelve men of integrity and who are in all other respects properly qualified. This is certainly the law in all criminal cases, which look to the protection of life and liberty, when one is unjustly assailed. (It is not necessary to discuss in this place whether just such a jury is required by the Constitution in civil cases, though I have a very decided opinion upon that matter).

An act of the legislature cannot make a juror, who is partial, disqualified and guilty of a fraud, competent. And it may be safely affirmed, that no verdict in any criminal case can stand, where one of the panel is wanting in integrity. He must fill all the requisites of the ancient rule as above defined.

And if the Court shall take jurisdiction of this case it will respect the former adjudications of that State rather than the last one. But as there is no construction of a statute (2nd Black, 418; 92 U. S., 494; *Id.* 502) which would make a rule of property, the Court will

look to the weight of authority; and that shows that the acceptance of the juror renders the verdict a nullity. See note of Eugene McQuillen, in Crim. Law Mag., Vol. 6.

DUE PROCESS OF LAW FURTHER CONSIDERED.

In Graham and Waterman, New Trials, Vol 1, p. 19–21, is found a case taken from Barnes, 455, where a judgment was had for 25 L., and the money was paid into the Court for the plaintiff; not having recovered more, plaintiff was liable to pay costs. Whereupon he moved for a new trial on the ground that the case was tried by eleven men only. It appeared that one of the jurors summoned did not attend, but his son of the same name, John Pearce, who was not qualified, took his place at the Assizes; and when the father was drawn answered for him, and was sworn on the jury. *Per Curiam:* "The verdict of eleven jurors is no verdict; it is null and void." Here was a false personation as well as a want of qualification.

And these authors say: "The same rule has been held to apply where the juror is destitute of the necessary personal qualifications."

In *King vs. Tremaine*, 11 Dowl., and Ryl., 684 (which was a prosecution for perjury) John Williams was summoned. When his name was called a person (who turned out to be Richard Henry Williams) answering thereto entered the box; was sworn and aided in bringing about the verdict. It appeared that the old man was ill, and not being able to attend, requested his son (the juror) to go in his place for him. This the son who was not of lawful age, did; he not knowing that any harm would be done thereby.

A rule was made for a new trial, and being argued, Abbott, Ch. J., delivered the opinion of the Court, saying: "I am of opinion that there ought to be a new trial. I do not see how a challenge, properly so called, could have been taken to this person, he not having been summoned as a juror. If he had been returned on the panel, then a challenge would have been the proper mode of objecting to him. No person on either side of this case appears to have been aware that this young man, who had thus intruded himself into the box, was not the party really returned upon the jury. The cause being to be tried by special jury, the *tales*, if prayed, would be to be taken from some other list, and a *tales* being prayed, this person is supposed to be taken from that other panel. I am aware of the difficulty mentioned by Lord Ellenborough in *Hill vs. Yates*, that this objection would afford an opportunity for evil practice; that by underhand contrivance, a party might get a person who is disqualified to answer for another, and to serve on the jury, reserving to himself the power of bringing the objection forward, if the objection should be against him. There is that difficulty certainly . . . . But I do not know that we should be justified from the apprehension of mischief in going the length of saying . . . . . that a verdict procured by a jury, on which a person incompetent, both by reason of non-age and want of qualification, has served, ought to stand, particularly in a case so penal . . . . . I think we are bound to look to the facts of this particular case, and say that the only mode of correcting this error, is to make the rule absolute."

Holroyd J. said: "It appears to me that in this case we could not pronounce a judgment upon the verdict

against the defendant. The affidavits acquit the defendant of all fault in the transaction, and discharge him of any privity to this young man serving on the jury. The verdict has been found by eleven competent jurors only. The twelfth is by law incompetent, he not having attained the age at which the law considers him of capacity to judge on matters of this kind; and that being so, we ought not to pass judgment upon a verdict so found; *particularly in so serious a crime as perjury.* To support a judgment, it must be founded on a verdict delivered by twelve competent jurors. This man was incompetent, and therefore there has been a mistrial." It will be noticed that both of these judges lay stress upon the fact of the serious nature of the crime; and it must be remembered that our case (murder) is much more serious than the offense in that case. Smith, the juror here, professed when taken to be, (or did personate) a competent juror, which would bring him without doubt under the same head as the other cases, while in neither of the two named did the juror intend to do anything wrong. His, Smith's, act was in fact, a fraud upon the rights of the party objecting and upon the Court; and more, there was perjury committed by him in order to get on the jury.

There is a learned note in Graham and Waterman, page 210, vol. 2, as to why jurors were required to be free-holders—one of the qualifications demanded by the law of Texas. In the "free-holder" was found by our English ancestors the man of substance, position, intelligence and integrity, which rendered him, and him only, in their judgment a fit person for the position. The exigencies of more modern times have enlarged the number of men deemed competent by embracing also the "house-holder;" but it is not certain

that by enlarging the field of selection good results have been obtained.

"*If there is reasonable doubt as to the impartiality of the jury, the party complaining is entitled to the benefit of it.*" This is a principle enunciated by the same authors on page 463, vol. 2. They proceed to say: "Jurors should be *clearly* and *beyond all question* impartial; and no one should be forced to a trial or compelled to submit to a verdict where there is a possibility of unfairness.

It is correctly stated by these law writers that if the defendant is fully advised as to the disqualification of the juror, and so accepts him, he has waived his objection.

In *Childress vs. Ford*, 10 Smedes, and M. (Miss.), p. 25, Sharkey Ch. J. said: "The sanctity of trial by jury requires that the jurors should be impartial and unbiased; and if it is afterwards ascertained that they were not so, the verdict should be set aside. *We mean for the present only to apply this rule where, as in the present case, the proper inquiries have been made to ascertain whether the jurors were competent. If the party chooses to go to trial without examining the jurors, the effect may be different.*"

This case is exactly like ours with the difference that Smith, the juror, in appellants' case was put upon his *voir dire*, and declared his competency; while in the Mississippi case the juror when *asked* if he had expressed an opinion, answered in the negative. Ours is a stronger case also in this—that the juror, Smith, was sitting on a trial for murder in the first degree; while in the other the juror was determining the fact whether a sale by the defendants in execution to the claimant was fraudulent. It turned out after trial that

he had on a former occasion declared such sale so to be.

The legal effect resulting from the taking on the jury of this fradulent juror, was in effect the trial of appellants by a jury of eleven instead of twelve men, which they were entitled to by all the authorities. Fraud vitiates everything, and if the other eleven jurors were good men, the fraudulent act of this one juror, must according to any fair mind, be deemed a fraud of such a character as to vitiate the verdict. See opinion of Hunt, J. (dissenting) in record.

The appellants were entitled to the jury spoken of in the Constitution, and that is the common law jury which consists of twelve impartial men. 13 N. Y. 378; 12 N. Y. 190; 14 Minn. 439; Work vs. State, 2nd Ohio (N. S.) 296; 30 Mo. 600: 5 Snead 360; 3rd Wisc. 219; 2 Metc. (Mass.) ——. 2 Wisc. 22; and see Sedwick Construction, Statutory Law, etc., pp. , and this is also required by the Constitution of the State of Texas—The common law jury must be preserved in its essential incidents, as to the method of impaneling, and in the qualities of impartiality. There may be changes made as to the number of challenges and other less important matters. See Stokes vs. People, 53 N. Y. 164; 6 Coldw. 539; 1 Coldw. 344.

When we look to the many assignments of error, all of which are in palpable violation of the Constitution of the United States, and two at least in violation of the constitution of the State of Texas, the mind readily comes to the conclusion without the slightest difficulty, that the great constitutional principle involved in the words "due process of law" was not only violated in the passage of the Penal Code and Code of Criminal Procedure of Texas, but in the administration of law in this particular case.

ADMISSION OF INCOMPETENT TESTIMONY.

And appellants further assign as error the admission of the testimony of E. J. Bates (or Jack Bates), page 8, record, and W. H. Harvey and W. H. H. Harvey, and other testimony in reference to other and separate assaults (see record pp. 20, 21 and 31). These assaults were not parts of the *res gestæ*. See Greenleaf, vol. 1, pp. 120 and 122.

"The principal points of attention are whether the circumstances and declarations offered in proof were contemporaneous with the main fact under consideration and whether they were so connected with it as to illustrate its character. * * They must be concomitant." There may have been forty robbers for aught we know, on the Gatesville road on the night of December 17, 1889. Besides, the proof is flimsy. See record pp. 2 to 11.

TESTIFYING AGAINST ONE'S SELF—UNREASONABLE SEARCHES AND SEIZURES.

I call particular attention of the Court to what has been heretofore said by several eminent judges with respect to these provisions of the Constitution, and the intimate connection between the two. In *Boyd vs. United States*, 116 U. S. R., at page 627, is found a judgment of Lord Camden, with reference to the power of the Secretary of State to issue search warrants, and which throws light upon this subject.

"The great end for which men entered into society was to secure property. That right is preserved sacred and incommunicable in all instances where it has not been taken away or abridged by some public law for the good of the whole. . . . . By the law of

England every invasion of private property, be it ever so minute, is a trespass. . . . . Papers are the owner's goods and chattels; they are his dearest property; and are so far from enduring a seizure, that they will hardly bear an inspection; and *though the eye cannot by the laws of England be guilty of a trespass*, yet where private papers are removed and carried away the *secret* nature of those goods will be an aggravation of the trespass. . . Lastly, it is urged as an argument of utility, that such a search is a means of detecting offenders by *discovering evidence*. I wish some cases had been shown, where the law forceth evidence out of the owner's custody by process. . . In the criminal law such a process was never heard of. . . . . It is very certain that the law obliges no man to accuse himself; because the necessary means of compelling self-accusation, falling upon the innocent as well as the guilty, would be both cruel and unjust. . .

Said Mr. Justice Bradley, in *Boyd vs. United States* (the case above referred to) in referring to this judgment of Lord Camden the following: "The principles laid down in this opinion affect the very essence of Constitutional liberty and security. They reach farther than the concrete form of a case then before the Court, with all its adventitious circumstances; they apply to all invasions on the part of the government and its employees of the sanctities of a man's home and *the privacies* of life. It is not the breaking of the doors, and the rummaging of his drawers that constitute the essence of the offence; but it is the invasion of his indefeasible right of personal security, personal liberty and private property, where that right has never been forfeited by his conviction of some public offence; it is

the invasion of this sacred right which underlies and constitutes the essence of Lord Camden's judgment. Breaking into a house and opening boxes and drawers are circumstances of aggravation; but any forcible and compulsory extortion of a man's own testimony or of his private papers to be used as evidence to convict him of crime or to forfeit his goods, is within the condemnation of that judgment. In this regard the 4th and 5th amendments run into each other. . . .

"Any compulsory discovery by compelling the production of his private books and papers, to convict him of crime, or to forfeit his property, is contrary to the principles of a free government. It is abhorent to the instincts of an Englishman; it is abhorent to the instincts of an American. It may suit the purposes of despotic power; but it cannot abide the pure atmosphere of political liberty and personal freedom. . . ."

"We have already noticed the intimate relation between the two amendments. They throw great light on each other. For the "unreasonable searches and seizures" condemned in the 4th amendment, are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the 5th amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the 5th amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the 4th amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him, is substantially different from compelling him to be a witness against himself. We think it is within the clear intent and meaning of those terms." . . . . .

"It is our opinion, therefore, that a cumpulsory production of a man's private papers to establish a criminal charge against him, or to forfeit his property, is within the scope of the 4th amendment to the Constitution, in all cases in which a search and seizure would be; because it is a material ingredient, and effects the sole object and purpose of search and seizure." (Page 622.)

Again, page 635. "Though the proceeding in question is divested of many of the aggravating incidents of actual search and seizure, yet, as before said, it contains their substance and essence, and effects their substantial purpose. It may be that it is the obnoxious thing in its mildest and least repulsive form; but illegitimate and unconstitutional practices get their first footing in that way, namely, by silent approaches and slight deviations from legal modes of procedure. This can only be obviated by adhering to the rule that Constitutional provisions for the security of person and property should be liberally construed. A close and literal construction deprives them of half their efficacy, and leads to gradual depreciation of the rights, as if it consisted more in sound than in substance. It is the duty of Courts to be watchful for the Constitutional rights of the citizen and against any stealthy encroachment thereon. Their motto should be *obsta principiis*."

It will be noticed that in the quotation from Lord Camden, which is that . . . "though the eye cannot by the laws of England be guilty of a trespass, yet where private papers are removed . . . the secret nature of those goods will be an aggravation of the trespass;" in other words, it is the eye which, looking upon what is written, carries to the mind the evidence which is used for the purpose of conviction. Can it be in any sense less true that it is

the eye, which, looking upon a naked body and examining it closely, carries to the mind the evidence upon which, in part at least conviction was sought to be had and was had in this particular case. And the admission of the testimony of witnesses as to what was seen or discovered on the body of Powell was wholly incompetent, illegal and improper, duly excepted to at the time and being permitted to go to the jury we tendered our bill of exception to the same, and which is set out in the record. It was not a part of the *res gestæ*. See Greenleaf Evidence before cited. This matter of the examination of Powell's body and the bruises had nothing to do with the killing of Mathis. Vol. 1, p. 120.

Now if, as Judge Bradley says, the 4th and 5th amendments "should be liberally construed for the security of person and property," and that "a close and liberal construction deprives them of half their efficacy and leads to a gradual depreciation of the rights," it seems unquestionable that the examination of a man's body by the jailer, or the officers of the law, or those having him in charge with power to compel him to submit in any event, for the purpose of getting proof in order to his conviction is clearly repugnant to the provisions of the 5th amendment. Powell's shirt was taken off by the jailer for the purpose of corroborating, in part, the statement of Harvey, a State's witness, that he had struck Powell on the head, back and shoulder; and had he resisted the action of the jailer would have doubtless been subjected to bad treatment, if not severe punishment. And had he positively refused to submit—this would have been urged against him on his trial as an additional proof of his guilt. And the legality of the whole proceeding was further excepted to, and a

bill of exceptions tendered. See record, page 21.

It is said that this examination of person was not effected by compulsion—that Powell consented. There is not a particle of proof showing his consent.

It is perfectly clear that the Constitutional provision as to "compulsory process" was violated in the refusal of the judge to continue the case upon the affidavit of appellants. And upon record, page 18, the Court will find our exceptions and tender of bill of exceptions. There was a necessity for time—proper, necessary time should have been afforded within which an effort could have been made to secure the attendance of the witnesses desired by process of attachment—the "compulsory process" needed in such case.

If Mrs. Buster and others would have proven an *alibi* —that the prisoners and appellants were twenty miles away when the deed was committed then these men were most unjustly condemned. And to say that they did not have that impartial trial by a jury of twelve men, which is guaranteed to them by the Constitution of the United States as well as by the Constitution of the State of Texas is a fact that looms up everywhere before us in the record. The fact that a man would foreswear himself in order that he might get on the jury is pregnant with proof of a fixed design of prejudice or partiality on the part of the juror, which no doubt was the feeling of the populace in the matter. A violent murder had been committed on a public highway. These men were apprehended as the murderers. The proof is weak and as before said only circumstantial. There is, however, the proof of Harvey that one of the men, Powell, he identifies or believes to be of the party assaulting him on the night Mathis was fatally wounded; but the assault on Harvey, made as he says

for the purpose of committing a robbery, was about six hundred yards from where Mathis was assaulted, and Harvey cannot say that Leiper was the other man of the two. He was taller and Powell shorter, and of the men assaulting him one was taller than the other. It is quite possible—it may be said with some confidence that two other and different men were the parties making the assault. It may be said, however, that the proof is too weak and flimsy in character to support so grave a charge as this without other testimony or further corroboration. There is another matter to which the attention of the Court may be called; and that is this. Beside Mathis, the man who was assaulted and murdered, there was his son, who saw the whole transaction. It would seem that he was a boy of sufficient size and years to give most important testimony in this case; and the fact that he was not introduced as a witness by the State is a circumstance of great weight, going to show that if introduced he would have failed to prove the identity of appellants with the two men who assaulted and killed Mathis. An assignment of error was made in the Court below upon the ground of the non-production of this boy. It would seem that the Court was moved, however honest the judge was, by some powerful outside influence. I say this with the most profound respect, but the rulings in minor matters, as well as in important ones, all seem to have been in the wrong direction. This Honorable Court will find on page 22, of the record, another assignment of error (and which was deemed material), viz: A refusal to charge upon drunkenness or the effect of drunkenness, and a further refusal to charge the law pertaining to murder in the second degree. Another assignment is that the Court compelled defendants to select jurors from a

venire of talesmen who had been ordered to be summoned by the Court after the special venire had been exhausted. Besides, the sheriff was not sworn, as required by the law before such talesmen had been summoned. There is an assignment that the indictment was defective also—(I am aware, however, of the decision in *Hurtado* vs. *California*, 110 U. S.)

DUE PROCESS OF LAW FURTHER.

This means that no person shall be deprived of life, liberty or property unless a prosecution or suit has been instituted and conducted according to the prescribed form and solemnities for ascertaining guilt or determining the title to property. Or, in each particular case, such an exertion of the powers of the government as the settled maxims of law permit and sanction, and under such safe-guards for the protection of individual rights as these maxims prescribe for the class of cases to which the one in question properly belongs. As applied to judicial proceedings, it means a course of legal proceedings according to those rules and principles which have been established in our systems of Jurisprudence for the protection and enforcement of private rights. To give such proceedings any validity, there must be a tribunal competent by its constitution —that is, by the law of its creation—to pass upon the subject matter of the suit . . . . . The words "due process of law" were undoubtedly intended to convey the same meaning as the words "by the law of the land" in Magna Charta; and by "the law of the land" is most clearly intended the general law—a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial. It

means, in fact, that every citizen shall hold life and liberty, as well as all other rights under the protection of the general rules which govern society. . . . . "Due process of law" is not necessarily process according to the course of the common law, but process according to the course of proceedings applicable to the subject matter, and conformable to those general rules that effect all persons alike. These are the fundamental civil rights, for the security of which society is organized, and all acts of legislation which contravene them are within the prohibition of the Constitutional guaranty. In judicial proceedings "due process of law" requires notice, hearing and judgment; in legislative proceedings, conformity to the settled maxims of free government, observance of Constitutional restraints, and requirements, and an omission to exercise powers appertaining to the Judicial, or Executive department. Their application in a particular case must be determined when the question arises, and in the absence of exact precedents courts must determine the question upon a consideration of the general scope of legislative powers, the practice of governments, and in view of the conceded principles that individual rights may be curtailed and limited to secure the public welfare and equal rights of all—See what Denio J. says in 12th N. Y. 212; American and English Encyclopaedia of law, Vol. 6, pp. 43, *et seq.* The words "law of the land," as used originally in the Magna Charta in reference to this subject, are understood to mean "due process of law," that is, by indictment or presentment of good and lawful men; and this, says Lord Coke, is the true sense and exposition of those words. The better and larger definition of "due process of law" is, that it means law in

its regular course of administration through courts of justice. 2 Kent Com. 13, and see 13 N. Y. 305; 30 Wis. 146; In 74 N. Y., 191, the Court said: "It is difficult to explain with precision the exact meaning and scope of the phrase 'due process of law.' . . . . It is probably wiser, as recently stated by Mr. Justice Miller, of the United States Supreme Court, to leave the meaning to be evolved" by the gradual process of judicial inclusion and exclusion, as the case presented for decision shall require, with the reasoning on which decisions may be founded. 17 Alb. L. J. 223.

Again see *Geigler vs. S. and M. Ala. R. Co.* 58 Ala. 599—"Due process of law" implies the right of the person affected thereby to be present before the tribunal which pronounces judgment upon the question of life, liberty, or property in its most comprehensive sense, to be heard, by testimony or otherwise, and to have the right of controverting by proof, every material fact which bears upon the question of right in the matter evolved. If any question of fact or liability be conclusively presumed against him this is not "due process of law." It may be remarked in this connection that there is no positive proof of the crime alleged against appellants. Notwithstanding the efforts of the State to make out a case against them the proof in the record shows there was no real identity with the parties who committed the crime proven. It goes only to the extent by one witness, that Leiper and Powell—the one a short and the other a tall man were as to stature somewhat like the guilty men or resembled them in that particular alone (the men who committed the act). There is another witness who speaks of one of the appellants as looking like the man who

fired the fatal shot, but he cannot say positively that he was the man. This is about the substance of the proof. Because these men in these particulars alone resembled somewhat the guilty parties the jury came to what we must suppose a conclusive presumption that they were guilty. This is in direct conflict with that "due process of law" spoken of in the above paragraph.

Again in 50 Miss., page 479 we have this: "These terms 'law of the land,' due course of law, due process of law," . . . refer to certain fundamental rights which that system of Jurisprudence, of which ours is a derivative, has always recognized. If any of these are disregarded in the proceedings by which a person is condemned to the loss of life, liberty or property, then the deprivation has not been by "due course of law." In 6 Coldwell (Tenn. 244) it was held that an act of the Legislature conferring on the Governor the power to set aside and annul the registration of the voters in the County, in whole or in part, was unconstitutional, as depriving them of their rights without "due process of law." In 4th Wheaton, U. S. 244, it was said as to these words from Magna Charta . . . "after volumes spoken and written with a view to their exposition, the good sense of mankind has at last settled down to this—that they were intended to secure the individual from the arbitrary exercise of the powers of government, unrestrained by the established principle of private rights and distributive justice."

The constitution of Texas makes provision that no man shall be compelled to be a witness against himself, and that the accused shall have, if required, compulsory process for witnesses. Sec. 8, Const., Article 1, and by Sec. 16 of the same Constitution it is provided that "No

citizen of this State shall be deprived of life, liberty, property,or privileges,outlawed,exiled, or in any manner dis-franchised, except by due course of the law of the land." Not only was the Constitution of the United States violated in these proceedings in several particulars but likewise also the Constitution of Texas. Appellants had a right to compulsory process for the witnesses named in the affidavit, and the record does not show how they were guilty of the slightest neglect. The refusal of the judge to continue the case at the time which prevented appellants from having compulsory process to compel the attendance of witnesses at the next term, was in fact, tantamount to a denial of compulsory process. Certainly there would be wanting also in this action of the Court "due process of law."

Republican Form of Government and Abuse of Its Powers by the Legislature.

Perhaps it may be well to say in this connection that the best explanation of what is the republican form of government, such as the Constitution was to guaranty to the respective States, is that defined by Mr. Lincoln in his memorable Gettysburgh speech—a classic that along with the most famous of the discourses of the great orators of the past, will go along down the distant ages. He said it was "the government of the people, by the people, for the people." In effect it was the law of the masses, made by the masses, not classes, for the benefit of the whole people. It is a government wherein the strong arm of the law stretches out its hand to protect the weak and defenseless from the strong and powerful, who are in turn to be protected from anarchy and public prejudice.

The case of *Luther vs. Borden* arose out of the ex-

traordinary state of affairs, which were brought about many years ago by Thomas W. Dorr, who claimed to be Governor of the State of Rhode Island. Mr. Webster was of counsel in the case. The opinion was delivered by Mr. Chief Justice Taney, who, speaking for the Court, laid down the law as to what was meant by guaranteeing a republican form of government. That was not alone that the State Constitution should be republican in form, but that the laws also which were passed by its legislature should have the same requisites. These laws were to be for the *res-publica*—the common weal —and whatever was opposed to that was adverse to a republican form of government—Congress has the control of that matter until the State enters the Union. Formerly its powers then ceased and this Court alone could afford relief; but under the 14th amendment Congress can pass all needful regulations in that respect, and continue to do so until there shall be found no real grievance from any quarter.

The learned judge of this Court who delivered the opinion in *Calder vs. Bull*, 3rd Dallas, 386 said (Chase J.) "I cannot subscribe to the omnipotence of a State Legislature, or that it is absolute and without control, altho' its authority could not be restrained by the Constitution or fundamental laws of the State. The nature and end of legislative power will limit the exercise of it. This fundamental principle flows from the very nature of our free republican governments, that no man should be compelled to do what the law does not require, *nor refrain from doing that which the law permits*. There are certain vital principles in our free republican governments, which will determine and overrule an apparent flagrant abuse of legislative powers such as to authorize manifest injustice by a pos-

itive law, *or take away that security* for personal liberty or private property, for the protection whereof "governments were established." (See 13 N. Y., 3 Kern. 391; 3 Cran., 385; 7 Johns., 477; 4 Hill, 146; 4 Conn. 225 and Luther V. Borden, 7 Howard, 1.)

"The obligation of the law in government established on express compact and on republican principles, must be determined by the nature of the power on which it is founded. A law which punishes a citizen for an innocent action, or, in other words for an act, which, when done, was in violation of no existing law; a law that destroys, or impairs the lawful private contracts of citizens; a law that makes a man a judge in his own cause; or a law that takes property from A and gives it to B. It is against all reason and justice for a people to intrust a legislature with such power; and, therefore, it cannot be presumed that they have done it. The genius, the nature and the spirit of our State governments amount to a prohibition of such acts of legislation, and the general principles of law and reason forbids them. The legislature may enjoin, permit, forbid and punish; they may declare new crimes, and establish rules of conduct for all its citizens in future cases; they may command what is right, and prohibit what is wrong; but they cannot change innocence into guilt; or punish innocence as a crime. . . To maintain that our Federal or State Legislatures possess such powers, if they had not been expressly restrained, would in my opinion, be a political heresy altogether inadmissible in our free republican governments."

Iredell, J.: "If then a government composed of legislative, executive and judicial departments were established by a Constitution which imposed no limits on

the legislative power, the consequence would inevitably be, that whatever the legislative power chose to enact, would be lawfully enacted, and the judicial power could never interpose to pronounce it void." . . .

Ruffin, Chief Justice of North Carolina, in a case before him defined what the term "law of the land" (said by Kent to be "due process of law") meant in the State Constitution. *Hoke vs. Henderson*, 4 Dev., 15: "They (the words) do not mean really an act of the General Assembly. If they did every restriction upon the legislative authority would be abrogated." In reference to the infliction of punishment and divesting the rights of property it has been repeatedly held in this State, and it is believed in every State of the Union, that there are limitations upon the legislative power, notwithstanding these words; and that the clause itself means that such legislative acts as professed, in themselves, directly to punish persons or to deprive a citizen of his property without trial before the judicial tribunals and a decision upon the matter of right, as determined by laws under which it vested, according to the course, mode and usages of the common law as derived from our forefathers are not effectually "laws of the land" for those purposes. See Story on the Constitution, 661; 10th Yerger, 59; 2 Cokés Inst., 45 and 50—I refer now to No. 85 of the Federalist, a paper written by Mr. Hamilton. He said, while pressing the acceptance of the Constitution on the people of New York, and pointing to its security for republican government, this: "The additional securities to republican government, to liberty, and to property to be derived from the adoption of the plan under consideration, consists chiefly in the restraints which the preservation of the Union will impose on local factions and insurrections,

and on the ambition of powerful individuals in single States, who may acquire credit and influence enough from leaders and favorites to become the despots of the people; in the diminution of the opportunities to foreign intrigue, which the dissolution of the Confederacy would invite and facilitate; in the prevention of extensive military establishments, which could not fail to grow out of wars between the States in a disunited situation; in the express guaranty of a republican form of government to each; in the absolute and universal exclusion of titles of nobility; and in the precautions against the repetition of those practises on the part of the said government which have undermined the foundations of the property and credit, have planted mutual distrust in the breasts of all classes of citizens and have occasioned an almost universal prostration of morals."

Effect of the 14th Amendment.

A few words are here added to what has already been said upon the effect of the 14th amendment and why it was passed. Mr. Thadeus Stevens, the leader of his party in Congress at the time and, especially in the matter of the 13th and 14th Amendments, pressed this amendment most strenuously upon Congress for adoption. See Cong. Globe, Vol. 58, 1865, 1866, p. 2459, 1st session, 39th Congress. He explained while the matter was under discussion the object sought by its adoption, saying, amongst other things: "The first section prohibits the States from abridging the privileges and immunities of citizens of the United States, unlawfully depriving them of life, liberty, or property, or of denying to any person within their jurisdiction the "equal" protection of the laws."

"I can hardly believe that any person can be found who will not admit that every one of these provisions is just. They are all associated in some form or other in our DECLARATION or organic law. But the Constitution *limits* only the *action of Congress*, and *is not a limitation on States*. This amendment supplies that defect, and allows Congress to correct the unjust legislation of the States, so far that the law which operates upon one man shall operate equally upon all . . . Whatever means of redress is afforded to one shall be afforded to all . . ."

In *Bartemeyer vs. Iowa*, 18 Wallace, 132, Mr. Justice Field says: "That the 14th Amendment, as also the 13th, grew out of the feeling that the Union was worthless if every citizen could not be protected in all his fundamental rights everywhere. . . . That they were intended to justify legislation, extending the protection of the National Government over the common rights of all citizens."

"It was intended to make it possible for all persons, of every race and color, to live in peace and *security* wherever the jurisdiction of the Nation extended."

"The 14th Amendment recognized a National citizenship, and declared that the privileges and immunities which embrace the fundamental rights which belong to all citizens of free governments, should not be abridged by any State. This National citizenship is primary, not secondary." 18 Wall., 137-141.

And Mr. Chief Justice Fuller, speaking for this Court *In re Kemmler*, 136 U. S., 449, must be understood as recognizing the principle above stated as correct. And see *Ex parte Milligan*, 4th Wal., 120.

After mentioning the fact of army and navy men being liable to be tried under different laws, how perti-

nent to the facts of this case is the language used in what follows. I read from page 123: *"All other persons*, citizens of States where the Courts are open, if charged with crime, are guaranteed the inestimable privilege of trial by jury. This privilege is a vital principle, underlying the whole administration of criminal justice; it is not held by sufferance, and cannot be frittered away on any plea of State or political necessity. When peace prevails and the authority of the government is undisputed, there is no difficulty of preserving the safeguards of liberty . . . ; but if society is disturbed by civil commotion—if the passions of men are aroused and the restraints of law weakened, if not disregarded, these safeguards need and should receive the watchful care of those intrusted with the guardianship of the Constitution and the laws. In no other way can we transmit to posterity unimpaired the blessings of liberty, consecrated by the sacrifices of the Revolution." The same views are held by this Court in *U. S. vs. Harris*, 16 Otto, 629, 644; *Strauder vs. West*, 100 U. S., 306, and in the Civil Rights Case, 109 U. S., 3-62.

The ninth article of the Constitution preserves to the States all powers not delegated by the States ~~to the Constitution~~ nor prohibited by it to the States, but it is now most clear since the 14th amendment that the Constitutional rights delegated by the States to the general government are full enough for all purposes and must no longer be subject to the control of, or interference by, the States. Having been ceded by the States they are now beyond recall. As these certain *rights of the States* were by the adoption of the 14th Amendment ceded to the general government, and are by the terms of the Constitution more or less under the control of Congress

—this Court has the right to enforce, and it is respectfully submitted, will enforce to the fullest extent that Constitutional provision. The States and the general government ought to move in harmony with each other, independent in their respective spheres for many purposes, but still to a large extent depending the one upon the others. And it is only by promptly conceding to the larger and more comprehensive government all its powers and putting these into practice, when required, that perfect concord can be secured. State rights are involved in this question of jurisdiction, the question being; whether this Court will entertain and review the proceedings in the lower Court. But that must be determined to be on the side of these appellants. Since the passage of the amendment, above referred to, this Court will see that every man—no matter in what Court he may be tried—State or Federal—shall have accorded to him all his Constitutional rights. The States, having the right to protect as they chose, willingly consented that Congress might pass the legislation appropriate in order to protect and secure all citizens, and that all questions affecting the life, liberty or property of the citizens of the States so protected by the Federal Constitution, should be looked into and finally settled by the Supreme Court of the United States. This august tribunal—(or shall I rather say this mouth-piece of the Constitution)–the final arbiter of all such disputes, is the agent of all the States to take in hand and see whether or not the Constitutional rights of any citizen of this land have been violated and, if so, to apply the needful remedy. It is only in this way—by the general government moving in its own proper orbit and the States moving in theirs that each and all may be ~~kept~~ held within the lines marked out by order and Constitutional

restrictions and limitations, and thus, while blending law with liberty, keeping step to the music of a perpetual union.

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Attorney for Appellants.

second degree is punishable by imprisonment. Now if these plaintiffs in error are hung, on what legitimate process of law will it be done? The State of Texas through her highest courts of adjudicature has approved this monstrous verdict, and sanctioned the judicial murder of plaintiffs in error and this in open defiance of the 14th amendment to the Constitution of the United States, and of their own law as cited above. Plaintiffs in error must look for relief to the Supreme Court of the United States. See the State vs. Startup, 10 Vroom 423, 432.

Whatever is in law essential to the aggravated punishment must be charged, or it cannot be imposed Bishop Crimminal Procedure, Vol. 1, Sec. 67, *et seq.*; McLaughlin vs. State, 45 Ind., 338; The State, 59th Main, 137; Landringham vs. The State, 49th Ind, 186.

Bishop Crimminal Procedure, Sec. 101, 102.
Bishop Statutory Crimes, Sec. 176-179.
Commonwealth vs. Walton, 238 11th Allen.
Bishop on Crimminal Procedure.
Bishop Crimminal Law, Secs. 725, 726.
See Secs. 1032 Art. 605; 1033 Art. 606; Wilson's Criminal Texas Statutes, part 1st.

By the law of Texas the indictment must allege that the killing was done with express malice, which was not done, and consequently without "due process of law" in the sense of the Constitution.

A statute should not be permitted to overturn a fundamental principle in our jurisprudence &c. See Bishop Stat. Crimes, sec. 70, 146. See Bishop's Criminal Proceedings, sec. 574, 575, 576, 577, 578.

It is an elementary principle of the criminal law that a want of averment cannot be helped by evidence, and that a jury cannot convict a person of any crime, how-

ever clearly it may be proved unless it is duly and technically set forth in the indictment. A verdict of guilty of murder in the first degree on an indictment drawn in the form contemplated by the statute would be invalid and inoperative unless it be held that the indictment in the common law form does duly charge in apt and proper words this grade of offence; 12 Allen 155, 171. Bishop on Criminal Proceedings, 587.

It must appear from the record that the question was necessarily involved in the decision and that the state court could not have given the judgment or decree which they passed without deciding it. Armstrong and others vs. The Treasurer of Athens County, 15 and 16 Peters and 1st Howard (14) 300.

It is sufficient if it appear by clear and necessary intendment from the record that the question must have been raised and decided, it need not appear in terms; 10th Peters, 164.

If it be found that the issue raised by the question of Federal law is of such controlling character that its correct decision is necessary to any final judgment in the case * * * * then this Court will reverse the judgment of the state court, and will either render such judgment here as the state court should have rendered, or remand the case &c.

20th Wallace, page 636, Murdock vs. The City of Memphis.

In the trial—or before final judgment—there was drawn in question various matters, that is to say; the validity of the statute of the State of Texas, which provided that if an incompetent juror is selected on the panel there could be no new trial given for that reason unless the party complaining could show that he was prejudiced thereby.

2. That under Article V of the Constitution of the United States no one can be compelled to be a witness against himself, nor by Article IV of the Constitution be subjected to unreasonable searches; as was done in this case in Powell's being compelled to submit to an examination of his body; further, that under the sixth and fourteenth amendments of the Constitution of the United States, the plaintiffs in error were entitled to have a trial by an impartial jury of twelve men which right was denied them; and that compulsory process (another constitutional provision) for the procurement of witnesses was denied them in fact, because of the refusal by the court to continue the cause in order that they might procure witnesses by the compulsory process of attachment, and to all which exceptions were duly made, or brought to the attention of the court on the trial below; and to all which objections so raised in the proceedings in the court below were decided adversely to plaintiffs in error.

G. P. M. TURNER,
WM. S. FLIPPIN,
For Plaintiffs in Error.

Office Supreme Court U. S.
FILED.
OCT 27 1890
JAMES H. McKENNEY
CLERK.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1890.

No. 1239.

Jim Leeper and Ed Powell,

Plaintiffs in Error,

vs.

The State of Texas.

MOTION TO DISMISS.

J. S. HOGG, *Att'y Gen'l.*

WASHINGTON:
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1890.

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Supreme Court of the United States.

JIM LEEPER AND ED POWELL,
PLAINTIFFS IN ERROR,

v.

THE STATE OF TEXAS.

No. 1239.

In Error to the Court of Appeals of the State of Texas.

MOTION TO DISMISS.

The State of Texas, defendant in error herein, now comes and says this Court has no jurisdiction of this cause for the reasons:

I.

That the record does not show that before, at, or after the trial in the district court of Texas, any title, right, privilege, or immunity under the Constitution, or any law or treaty of the United States, was specially set up or claimed by the plaintiffs in error, or either of them, or that any such immunity, privilege, right, or title was in any way denied them.

of the murder but a few minutes later (Tr., pp. 20–21); the fourth was to the court's action in permitting a witness to tell of discoveries made by taking the shirt off one of plaintiffs in error while he was a prisoner (Tr., pp. 20–21); the fifth, and last one, was to the court's failure to charge on murder in the second degree (Tr., p. 22).

By their motion for a new trial, plaintiffs in error asked the verdict and judgment set aside on the grounds set forth in their five bills of exceptions, and also on the additional grounds that one of the jurors was not qualified as such under the laws of Texas, which was for the first time discovered after the trial; and, "because owing to the disqualification of said juror, the defendants have not had a trial in accordance with law;" and, "because the verdict is contrary to law and the evidence" (Tr., pp. 22–23).

On the court's action overruling their motion for a new trial, the plaintiffs in error filed in that court their assignment of errors which were confined to the points made by the bills of exceptions, and the motion for a new trial. Nowhere in them can be found any reference to Federal questions (Tr., pp. 29–30).

In considering the case on appeal, the Texas Court of Appeals discussed the questions raised by the assignment of errors as to the admissibility of the testimony showing other assaults to rob committed within a few minutes after the main offence; the admissibility of the testimony as to the condition of the prisoner's body which was discovered by a search of his person while under arrest; the failure of the court below to charge on murder in the second degree; the action of the district court in overruling the application for a continuance; the qualification of the juror and the sufficiency of the evidence in the case. No other questions were raised, discussed, or involved directly

or indirectly by the decision, and neither of them had any relation to Federal law, or to rights thereunder (Tr., pp. 30–33).

Among the eleven grounds presented by plaintiffs in error in their motion for a rehearing, the first one alone attempts to raise a Federal question by assailing the validity of the indictment on the ground that in form and substance it is "illegal and in contravention of the Constitution of the State of Texas and of the United States" (Tr., pp. 34–36).

On that motion two opinions were rendered. One by the majority of the court overruling it (Tr., pp. 37–39); the other by one of the judges dissenting (Tr., pp. 39–47). The only question discussed in either was the qualification of the juror under Texas laws. No Federal question, or right, title, immunity, privilege, or claim under or affecting any Federal law was invalid or referred to.

The Court of Appeals refused to enter "notice of appeal" by plaintiffs in error, to which a bill of exceptions was taken (Tr., pp. 47–48); but a writ of error was allowed, and so the case is here (Tr., pp. 59–60).

By their petition for writ of error the plaintiffs complain: First, that the indictment was bad; second, that one of the jurors was disqualified; third, that the prisoner (Powell) was made to remove his shirt, and in that way tc give evidence against himself; fourth, that the court refused to enter their "notice of appeal" on the docket. All of which they elaborately describe and charge as violative of rights guaranteed them under the Constitution of the United States (Tr., 48–51).

I.

FIRST PROPOSITION OF LAW BY DEFENDANT IN ERROR IN SUPPORT OF ITS MOTION TO DISMISS.

To vest the Supreme Court of the United States with jurisdiction of a case by writ of error to a State court of last resort, the record therein must show that before the trial court some title, right, privilege, or immunity under the Constitution, or a law or a treaty of the United States was specially set up or claimed by the plaintiff in error, and that it was finally denied him.

Statement.

The pleadings, evidence, and record, show that issues only arising under State laws were presented or passed on by the trial district court (Tr., pp. 1–30).

Authorities.

"If the right was not set up or claimed in the proper court below, the judgment of the highest court of the State in the action is conclusive so far as the right of review here is concerned" (Spies *v.* Ill., 123 U. S., 131; Baldwin *v.* Kansas, 129 U. S., 56–57).

II.

SECOND PROPOSITION OF LAW OFFERED BY DEFENDANT IN ERROR.

To give the U. S. Supreme Court jurisdiction of a writ of error to a State court it must appear affirmatively, not only that a Federal question was carried before and *presented* for decision to the highest court of the State having jurisdiction, but that its *decision* was *necessary* to the *de-*

termination of the cause, and that it was *actually decided*, or that the judgment as rendered could not have been given without deciding it.

STATEMENT.

Neither the assignment of errors in the trial court (Tr., p. 29) nor the opinion rendered in the case by the State court of last resort (Tr., pp. 30–33) refer or in any way allude to a Federal law or any claim or right thereunder.

AUTHORITIES.

De Lassure *v.* Gaillard, 127 U. S., 233. Also: Brown *v.* Atwell, 92 U. S., 327; Citizens Bank *v.* Board, &c., 98 U. S., 140; Chouteau *v.* Gibson, 111 U. S., 200; Adams Co. *v.* B. & M. R.R., 412 U. S., 123; Detroit City R.R. *v.* Guthord, 114 U. S., 133; N. O. Water W. Co. *v.* La S. Ref. Co., 125 U. S., 18.

III.

THIRD PROPOSITION OF LAW TENDERED BY DEFENDANT IN ERROR.

A Federal question not presented until after the decision of the State court of last resort has been rendered, arises too late to give the United States Supreme Court jurisdiction of the case.

STATEMENT.

The first attempt by plaintiffs in error to raise a Federal question was in the first section of their motion for a rehearing filed in the Court of Appeals (Tr., p. 34); and it was not a Federal question, nor was it referred to in the court's opinion denying the rehearing (Tr., pp. 37–39).

The next effort to raise such a question was by their petition for a writ of error (Tr., pp. 48–50).

AUTHORITIES.

"We act on the case as *made to the court below* when the judgment was rendered, and cannot incorporate into the record any new matter which appears for the first time after the judgment, *on a petition for rehearing*. Such a petition is no part of the record on which the judgment rests." (Susquehanna Boom Co. *v.* W. B. Boom Co., 110 U. S., 57.)

"We act only upon the record of the court below, and of that record the petitions for the writs of error form no part;" *Id.*

"It is essential that the *record* should disclose not only that the alleged right, privilege, or immunity was *specially set up* and claimed in the court below, *but that the decision of that court was against the right so set up or claimed.*" Clark *v.* Pennsylvania (128 U. S., 397).

Also, Warfield *v.* Chaffe (91 U. S., 690); Spies *v.* Ill. (123 U. S., 131–181); Brooks *v.* Missouri (124 U. S., 394); Chappell *v.* Bradshaw (128 U. S., 134).

Most respectfully submitted.

JAMES S. HOGG,
Attorney-General of Texas, for Defendant in Error.